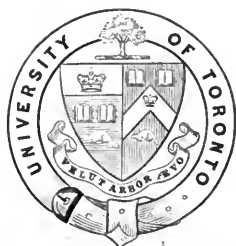


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RIDDELL ESSAYS AND ADDRESSES

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The Correspondence of Lieut. Governor John Graves Simcoe, with allied Documents. Collected and edited by Brigadier-General E. A. CRUIKSHANK, for the Ontario Historical Society. Vol. III: 1794-1795. Toronto. 1925. (\$1.00.)

AGAIN General Cruikshank and the Ontario Historical Society have placed under obligation all who are interested in the early history of Upper Canada and in its first lieutenant-governor. During most of the time covered by this volume, Simcoe was in a state of great anxiety in respect of the safety of his province in case of a war with the United States, which he considered inevitable. That he wished for such a war is one of the calumnies which have come down from early times to ours based to a certain extent upon his activity in carrying into effect the commands of his military superior. But war seemed inevitable after the foolish speech of Dorchester in answer to the Seven Nations and the command to build the fort at the Miamis; and Simcoe could not foresee that Mad Anthony, after bluster and brave words, would quietly withdraw, nor could he foresee that what seemed to be an intention of the Home administration, Dorchester's masters, to commence a war with the United States, was not to result in war. In case of such a war, he thought Upper Canada on any defensive plan would certainly fall, and war was in fact terribly near; had Major Campbell not been cool and restrained, had he been a Mad Anthony, no one can say what would have happened. Nay, had one British soldier acted rashly and fired on the American troops the cannon loaded, primed, and aimed at them, it is hard to see how war could have been avoided. In the military mind—and Simcoe was a soldier—there seemed no way out.

This volume helps us to see that there were two obstacles to war. One was the president of the United States, George Washington, whose military destructive skill has been praised, perhaps overpraised, but whose civil constructive skill has received less attention than it deserves. He knew that the best security for the young Republic was peace with and friendship of Britain; and Jay was sent to London to negotiate a treaty. The other obstacle was the feeling in London and throughout the British Isles. Even so well-informed a man as Jay had the idea that the insensate rancour shown by no small part of the American people toward everything English, a rancour not yet wholly dead, was reciprocated in England. When he got to London, he found to his amazement that king, cabinet, and people were unanimous in a conciliatory policy

towards the United States (p. 317). While many of his compatriots thought of the king in terms of that political manifesto, the Declaration of Independence, the most successful instance of propaganda in modern history, he found to his astonishment King George popular, a model of private virtue, industrious, sober, temperate, affectionate, and attentive to his queen and children, a patron of the arts and sciences, and in general well-intentioned and persevering. As to the cabinet, even Lord Hawkesbury was in favour of conciliation; while the sentiment of the people was shown at the dinner given Jay in London, at which were present the principal cabinet ministers. The toast to the president of the United States, proposed to be with three cheers, was greeted with six, and every toast manifesting a desire for cordiality and conciliation with America met with general and strong marks of approbation. Nor was this a pacifist gathering: when Jay ventured a neutral toast wishing "a safe and honourable peace to all the belligerent powers", it was received coldly, and with about as much enthusiasm as Woodrow Wilson's "Peace without Victory," of which it was the prototype. The feeling of these *merchants* was—as to France, war to the knife, the knife to the hilt—as to America, peace, conciliation, harmony. It was not until Washington had ceased to speak, and until the party who detested and vilified him became paramount, that the Union declared war.

Simcoe states with some pride that the idea of war called forth all the loyalty of the province, and that he could have relied on the loyalty of no man more than on that of a gentleman who had opposed his pet scheme for courts—Richard Cartwright—and there can be no doubt that had there been war, Upper Canadians would have stood shoulder to shoulder under Simcoe to repel attack, however hopeless they might think the resistance would probably be. Simcoe's own determination is shown by his specific orders to the commandant of the Miamis Fort to fire on any United States troops which should approach.

Simcoe's difficulties with Dorchester crop up at every turn. The truth is that he was in a false position, being in military subordination to the governor-in-chief (who detested and thwarted him), while he was responsible for the government of the province, itself largely military in character.

While his sovereign "gloried in the name of Briton"—or Bute said he did—Simcoe did not. He was not a Briton, he was an English-man. He had not got as yet so far as to complain of Scotsmen being advanced in the army—that was to come later; but in his mind England was the Empire, and everything English was to be the model in his province. Courts on the English plan were erected, lieutenants of counties appointed, charters for towns were recommended, the Church of England (not of Scotland) was to be established, and schools and university

to be placed in charge of her clergy. His opinion of the Methodists corresponded with that of the bishop of Quebec, who thought their preachers to be "itinerant and mendicant Methodists, a set of ignorant enthusiasts whose preaching is calculated to corrupt the morals, to relax the nerves of industry, to dissolve the bonds of society."

There are some curious facts stated in the correspondence in this volume. That Charles Smith, clerk of the Court of Common Pleas for the district of Hesse, who with some of the Detroit militia, in the face of express prohibition by the commanding officer, joined the Indians in their attack on Anthony Wayne and was killed at Fallen Timbers, was quartered alive, and that his death was almost immediately avenged by the Indians capturing an American officer and cutting him into pound pieces with their scalping knives, is too horrible not to be true (p. 29). (By the way, he spelled his name "Smyth".)

That Britain refused even to consider paying for slaves who had taken refuge under her flag and never had even the slightest thought of surrendering them, being prepared to protect them with all the force of the empire, everyone should know (p. 82).

There was once real danger of Canada losing Wolfe Island (p. 240). The story of Father Burke and his devotion to the British cause is an epic in itself (p. 247).

A few slips may be noted. "B. B. Tickell" (p. 117) was Richard Barnes Tickell, who received a licence to practise law under the Act of 1794, and was shortly thereafter accidentally drowned, much to the sorrow of Col. and Mrs. Simcoe. The "Roe" mentioned on page 46 was certainly Walter Roe of Detroit, one of the two lawyers referred to on page 2. The proof-reading is excellent, but occasionally a hiatus is formed by one or more letters dropping out.

The volume, like its predecessors, is well printed on good paper, is well bound, and is a credit to all concerned in its production. We will welcome its successors.

WILLIAM RENWICK RIDDELL

which they had spent so many years in gathering, and the brook sang its song in vain. It was so beautiful a melody that, though the stars remained quiet (since mother sky was watching them) their toes began to tingle, to twinkle ever so little. You can see them twinkling. Until at length one star, who lived very close to the mouth of the great dragon who roams the sky, yielded to the pleading of the brook, plunged down from the heavens, leaving a great streak of gold dust behind, to dance that night with the brook. Other stars who saw him followed, but the sky still smiled her slow, silent smile; for she knew more than the brook.

"Will all the stars in the sky accept the invitation?" asked the boy.

"Who knows? The stars in the sky are many," replied the old warrior.

"Then why does the sky smile?" very softly.

"When you become a great warrior you will go down to the sea and if you look into its depths you will see the sky. The brook carries the stars to the river, thence to the sea where the sky is waiting. They cannot escape her, so she only smiles when they run away."

The old man returned to his musings, while the boy lay on the moss watching the stars dance in the brook and twinkle in the sky, thinking about the story which he had heard. Suddenly, as he watched, he saw a great flaming star shoot across the heavens; leaving a long, golden streak across the silently smiling face of the sky.

D. C. S.

VICTORIA

An Address delivered at the Victoria College Alumnae and Alumni Dinner, in Burwash Hall, on Thursday, January 29th, 1925,

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C.

NOTHING can be more natural or more appropriate than that the sons and daughters of our common mother, Victoria, whom we at least of the older generations fondly call "Old Vic.," our beloved Alma Mater, should assemble themselves together from time to time in token of their appreciation of their common and glorious heritage.

And her history makes it not unfitting that, essentially Methodist as she is, one who is not a Methodist, but a Presbyterian, and who has taken no active part in the project of uniting his Mother Church with the Church of Victoria, should be selected to speak. For the very life and soul of Victoria lie in tolerance, broad-mindedness.

Goldwin Smith, who with all his failure to understand Canadian questions, had a singularly clear and accurate conception of world affairs, was wont to say—I heard him say it for the first time at a Victoria Convocation in Victoria Hall in the old Town of Cobourg, more than half a century ago (*eheu fugaces labuntur anni*)—that other Churches were founded in opposition to existing forms of religion, but the Methodist movement was founded in opposition to sin alone. John Wesley was an enemy only of sin. So Victoria was founded, not in opposition to any institution, existing or projected, but in opposition to ignorance alone—Victoria was and is an enemy of ignorance only.

The story of University education in this Province has not been adequately

told, nor do I propose here to attempt to tell it at all fully. But a few words may not be amiss.

John Graves Simcoe, our first Lieutenant-Governor, has often, absurdly enough, been hailed as the author of University education in Upper Canada—I presume it was on that hypothesis that "Simcoe Hall" was so named. Simcoe, on the contrary, did more than almost any other man to prevent a national university being an early possibility. A great soldier, a great administrator, patriotic to the core and wholly self-sacrificing, he came to Canada with the full and fully avowed purpose of making his Province a replica, as far as possible, of his native land. He looked upon the Church, upon religion and upon education rather as political agencies. I do not mean that he was a non-believer or an uneducated man—no one can read his letters (as I have read hundreds), but must see that he was a devout believer and a man of education. His religion is unfeigned and his language pure and appropriate—not lacking the apt quotation from Latin authors, in his time the characteristic of the educated. Nor are these an affectation; they appear in his private letters to his intimate friends, and are clearly with him familiar as household words.

His experiences in the Revolutionary War were in some respects unfortunate. He came to the conclusion that the Revolution was largely due to the want of an aristocracy; he would gladly

have made an hereditary aristocracy in Upper Canada if he could have found the material. In any suggestion of university education, it was the upper class, the aristocrat, which he considered. He had a horror, very common in his time, of the "enthusiast" in religion, the "sectary" who did not agree with him in his view of church government and of the proper staidness and formality to be observed in divine worship. He had got far beyond the stage, indeed, of my own ancestors a century before who, hanged for the Solemn League and Covenant, would gladly and conscientiously, in the fear and to the glory of God, have hanged their persecutors if they had had the power. But he thought, sincerely thought, that these "enthusiasts" were a danger to the State, a peril to British connection; he had persuaded himself, forgetting Washington, that those within his communion were the real Loyalists, and those without were at least to be watched. He did not hesitate to tell Presbyterians, when they asked that their clergyman, who was a Loyalist and had suffered for his loyalty to Britain's Crown, should be allowed to celebrate matrimony, as was his right in Scotland, that such a request indicated a wicked heart. With him, as with James I, the maxim was a truism: "No Bishop, no King."

Some of those of his time or a little later were wont to call Methodists, "Swaddlers," a name given them in Ireland from one of their preachers who frequently said that he honoured above all gods, the Babe in swaddling clothes in Mary's lap in the manger at Bethlehem. If I were a Methodist, as I am not, I think I should not object to being named after the Babe in swaddling clothes.

It followed as a natural and inevitable consequence that any scheme for a

university emanating from a virile Governor like Simcoe, with such sentiments honestly and consistently held, meant a university such as existed in England, wholly under the governance of one religious body and for the benefit of one social class. And it was Simcoe who first and definitely fixed in the programme of the governing class in the Province this conception of a state university, and thereby retarded for decades the cause of university education.

I do not propose here to trace the history, interesting as it is—suffice it to say that Victoria was founded to give those an opportunity for a higher education who refused to be bound by the theories and views of those in power. All honour to the founders of Queen's, our sister from the first; all honour, too, to the devoted teachers in the old King's College who showed themselves above sectarianism—but we Victorians may be allowed to honour the founders of Victoria, which opened her doors wide to those of all denominations. If her first graduate was a Methodist, her second was a Presbyterian; and it was one of the most cherished privileges of our old Convocations to see sitting side by side, Dr. Hodgins the Anglican, Dr. Ormiston the Presbyterian, and Dr. Nelles the Methodist.

It was not long before the Province rid itself of the old-world theories of its early Governors; but may we not have a modest pride in Victoria leading the way?

This is not the place or the occasion to tell the story of her progress and her work, her trials, troubles and successes. Her story has been written by competent hands and but awaits proper editing and arrangements for its publication. It is but little to our credit—the credit of the graduates of Victoria

—that the work of Dr. Burwash and Dr. Reynar remains a manuscript unprinted and practically unknown, awaiting the beneficence and *esprit du corps* of some lover of the old College and her great men of the past.

The work done in and by Victoria needs no laudation by me or by anyone—*si monumentum requiris, circumspice*. With means always stinted, the College always undermanned, her students “cultivating the muses on a little oatmeal,” her professors underpaid, she yet successfully strove to keep the light of education burning and the standard high. Her graduates were called upon to fill offices in Church and State, and feared comparison not at all; she filled a place honourable and honoured in the life social, religious and political of our land—and her children rose up and called her blessed.

The evil days came—the new Province of Ontario was poor and hard-pressed for funds; the Prime Minister and his Cabinet, looking round for means of retrenchment, saw the grant of \$5,000 to Victoria, and the axe fell.

So poor was Victoria that the loss of \$5,000 seemed almost a deathblow.

But there were giants in those days—I do not suggest that stature in the faculty has diminished—Dr. Nelles, Nathanael Burwash, Alfred Reynar, Abraham Bain, John Wilson, determined that Victoria should not die; and, deprived of State aid, with resources sadly curtailed, these men accepted pitiful salaries, set their shoulder to the wheel with faith in God and confidence in themselves, and carried her through her time of stress and danger with triumphant success. These were the times of Victoria as I knew her over half a century ago.

Before my undergraduate days were over the faculty was joined by Dr. Eugene Haanel, in many respects the

best and most inspiring teacher I ever knew. A German who left his native land because he could not bear the imperialistic views which were already becoming manifest, and which were a few decades later to plunge the world in blood and ruin; a man of profound and accurate knowledge who seemed to have taken all natural science for his province; a teacher who believed that what he taught should become part of the very mind of the student, not to be forgotten after a successful examination; an experimenter whose manipulation of apparatus was a delight to witness and the despair of those less expert; intense in his views, tolerant with mediocrity but intolerant of indifference and insincerity—his pupils have reason to thank their good fortune in being privileged to attend his classes. And he, too, gloried in his students. He to-day counts the days spent with his students in Victoria the happiest days of his life. He speaks still of the intentness of their expression in the endeavour to grasp what was being taught, which was an inspiration to him to make every effort to satisfy their longing for knowledge, and the great joy which filled his heart when he could see the clouds disappearing and comprehension making itself manifest by the clarified look which no teacher can mistake.

We, his old students, cannot forget, we wish him the enjoyment of many happy days in his *otium cum dignitate* of senescence in Ottawa.

The others of my teachers have passed over—yet remain dear to many hearts.

Dr. Samuel S. Nelles, the acute metaphysician and accurate logician, well read in classical and modern literature, of great learning, often concealed under the lively jest; deeply religious, but having no sympathy with gloomy reli-

gion—for religion was a joy and a delight to him—full of brightness and love for his fellow-man; to hear that he was to preside or to take part in a meeting was to know that the meeting would be a success. When he preached he was always sure of a large congregation; steeped as he was in the spiritual, his language was never sombre or his sentiments saddening; hating sin, he knew that sin was natural to man and he bore with the sinner in tenderness and love. In all his teaching, he kept in mind the future—not that his students should make money out of what they learned, but that it should be manifest in their lives. He never quoted our college maxim, but he lived it—*Studia abeunt in mores*. The value of what we learn is best shown by the life we live in consequence of it.

Dr. John Wilson, affectionately called "Old Trin," a graduate of high academic standing of the Silent Sister, Trinity College, Dublin, saturated with the classics, which he considered the true Humanities—with a minute and severe grammatical knowledge, to whom a false quantity was a torture, but with a full appreciation of the grandeur and spirit of the Latin and Greek writers, giving an elegant and chaste English setting to the concise and difficult original, and impatient—so far as it was possible for so sweet a spirit to be impatient—with slipshod English as with inaccurate Latin, he taught his subject as a master, as he had learned them as a faithful student.

Abraham Bain as an undergraduate devoted most of his time to classics and the modern languages, taking only such modicum of mathematics as was necessary to entitle him to a degree—in those days classics and mathematics were the real University studies; all else might, indeed, be ornamental or

even useful, but classics and mathematics were the bread of life, the things needful, and about two-thirds of the undergraduates' time was spent on them. When Dr. Kingston resigned and a successor was sought, Abraham Bain, then a tutor, undertook to qualify himself for the chair. He went to Harvard and worked through a severe course of training. Returning, he proved a competent and successful teacher. This but illustrates a favourite contention of mine, that mathematics is but clarified and systematized common sense and that any ordinary mind, with faithful application and proper teaching, can master the subject.

Professor Bain in his classroom was painstaking and patient—anxious to remove the difficulties his students found. No one hesitated to ask his assistance, and that assistance was always cheerfully and effectively given. A little severe in examinations, perhaps, but the rigour was wholly justified by his thoroughness in class.

He was, however, essentially a lover of literature and, faithful and successful teacher of mathematics as he was, it must have been a relief to him when the change was made; Victoria came to Toronto and he to the teaching of history.

Nathanael Burwash, a tower of strength to any cause, of whom it was said with much truth that he could teach any of the college subjects. I took with him such varied courses as chemistry, mineralogy, botany and Hebrew; and his pupils will bear witness that what he taught they knew if they cared to know. A devout Christian, but not afraid of truth wherever found, he held that the Almighty could not tell one story in this first work, His World, and another in His last, His Word; that if they seemed to conflict, one or the other must be misunder-

stood; that both must be studied reverently, but fearlessly, and any apparent contradiction must be removed by prayerful study and trustful prayer. In a generation in which Darwin and Huxley and Spencer were looked at by many with abhorrence, he held and taught that they must be listened to, but listened to critically and in the light of truth from other sources of truths as important as any they could bring. A great man, a great scholar, a great administrator, the world was poorer when Nathanael Burwash died.

Alfred Reynar, almost a kinsman, our professor of modern languages, a sound classic, thoroughly well read in the literature of France and Germany and a lover of our English classics—to hear him speak was a liberal education—his criticisms of our feeble efforts were kindly but trenchant; a mistake in rhetoric or orthography corrected by him was seldom repeated. His delightful personality and quiet humour made him a companion to be desired: brilliant in conversation, he never sought to outshine those with whom he consorted. But some will remember him not so much for his intellectuality, great as that was, as for his spirituality. No one could long be in his company but must take note of him that he had been with Jesus, not in the manner of him of whom this was first spoken, but in that of the disciple whom Jesus loved. A pure, loving and lofty soul characterized my friend who has gone—but one other man, and him in a different sphere of life, have I met in my three score years and twelve whose soul shone through its garment of flesh as did the soul of Alfred Reynar.

Such were the men under whose care and training were the students of the Old Victoria. *Ave et valete*, Nelles, Wilson, Burwash, Bain, Reynar.

And then came the revolution. "The Temple of Athene in the Athens of Canada"—thus I have, without mental contradiction, seen Cobourg designated in a Scottish paper—had its doors open to all the world, except to those of the sex of Athene herself. None of the learning of Minerva was to be imparted to a woman: women might attend collegiate institutes and normal schools and receive all such instruction as these could give; could be educated in not only the subjects of secondary schools proper but also the subjects of at least the first university year; they could teach in primary schools, in high schools, in collegiate institutes—but thus far and no farther. Some girls asked to be allowed to attend some of the classes—one of these is sitting at this table and her own girl is present, an alumna of Victoria. A class or two might safely be allowed to the young "female"; but more was to come.

A very brave woman of good education, who could not even plead the rashness of youth, Adeline Shenick, asked for a complete Victoria education, and a degree!

When this became known, there was a fluttering in the dovecotes of Cobourg—almost dismay, not unlike what would at the present time appear if it were suggested that a woman should become an ordained minister and fill a stated charge—unladylike, unwomanly, nay, unchristian—false to the modesty and proper reserve of the sex.

It is fair to say that it was not in academic circles that this sentiment was most manifest. The faculty seemed to take the request coolly, even sympathetically. Notwithstanding the woeful vaticinations of many good, honest, intelligent and earnest souls, the lady persisted and she got a degree.

And the world did not come to an end; things academic proceeded in the

same calm, philosophic way, and Victoria welcomed women to her halls and her degrees.

This change was a revolution, and it was to the advantage of all woman students, of Victoria and of Canada.

Her alumnae have had no little to do, in this Province and Dominion at least, in correcting the laureate's dream of "sweet girl graduates with their golden hair." No doubt their coiffure may be a care and their hair a glory to them, but their chief care and glory are that they should be and are educated women, able and willing to do their share of the world's work.

When a university could do its full duty by teaching classics, mathematics, moderns, a little metaphysics and logic, when science could be taught by one man, the Cobourg Victoria could hold her own; but the day came when all that, much as it was, was not enough. The natural sciences became differentiated as is the case with all advance in nature or art. Geology claimed its own and was not satisfied to be taught by a chemist, scarcely even by a mineralogist or a palæontologist; physics demanded mathematics even more than experiment; physiology and zoology parted company, perhaps to the detriment of both, and botany refused to be a Cinderella neglected for her sisters. All this meant teachers, apparatus, room, money; and Victoria looked in vain for sufficient support. I was one of those who fought Federation to the last; I was one of those who refused to take part in the meeting of the Senate called for Toronto. I loved the Old Victoria and longed to have her remain in her historic seat.

But it was not to be—and I do not regret the change, made as it was against my strenuous opposition.

When the change was actually made, the opponents ceased all opposition and remained and remain loyal sons of Victoria in Toronto, as they were loyal sons of Victoria in Cobourg.

And she has made good: her worth is recognized and the University of Toronto would be distinctly poorer if Victoria were for any reason to depart—*absit omen*.

Her doors are still open to students of all creeds; and her students fraternize on equal terms with those of her sister colleges, University, Trinity, St. Michael's—her eye is not dim or her natural force abated.

What of the future? Victoria must needs fulfil her destiny in combatting ignorance; she must seek truth wherever it can be found and cannot be deterred by the fear of hard names. If the truth, reverently sought, lead her along lines unknown to and unsuspected by those of old, it is but a new instance of an old experience. There were giants in those days, and they saw far, but a smaller man on a giant's shoulders can see farther than the giant—it but needs to be quite sure that the judgment and ability to distinguish clearly be as good in the supported as in the supporter. If he sees something the giant could not, he need not fear the name of Modernist, Innovator, what not.

Our world is becoming better and brighter every day; we are learning, day by day, more of the marvellous works of the Creator—it is the one reason for Victoria's existence that she may do her share in increasing that knowledge and in bettering and brightening that world. Be it ours to uphold her hands.—*Floreat Victoria*.

THE MONOCLE

During the year which is flitting by so rapidly, the Monocle has actually endeavoured to temper its criticism with merciful humour. The attempt has been only partially successful, but our realization of the helpless incompetency of most of the college organizations and societies has become more pitifully poignant. Two recent events at least have cast the warm glow of first enthusiasms over our outlook. The Glee and Choral Clubs have made a long and eagerly awaited effort to lift the life of the college out of its static groove. The unqualified success of "The Wishing Cap" has given me brave hopes that Victoria may yet develop a college life which will really interest and benefit, and not merely bore, the majority of the students. The Fancy Dress Skating Carnival, held on Wednesday evening, February 18, was the second event of the year which really aroused, as well as amused, the student body. This affair was a singularly happy substitute for the annual January Freshman Reception. Chairman Alf. Stone, B.A., and his committee, Misses Mary Howard and Luella Bruce, and Mr. Fred Wansbrough had worked overtime in preparation for this gigantic function and their efforts were most enthusiastically rewarded.

Shortly after eight o'clock clouds of gaily costumed figures (over two hundred and fifty in number) descended from realms unknown upon the hoary Little Vic rink. Famous figures of the historic past—figures which never existed previously independently of highly imaginative minds—the fanciful Seven Sutherland Sisters—my favorite heroine, Alice of Wonderland—Humpty-Dumpty, almost hidden by a

galaxy of fairy Queen—altogether delightful and whimsical Dutch twins—recalcitrant agriculturists mixed up with theologians of the most advanced type—all of these characters mingled into a huge and confused assemblage. Academic worries and the "higher seriousness," intrenched so irresistibly in Victoria College life, were swept away by the powerful sparkle of carnival cheer. Mr. James Graham, looking really fierce and terrible in an Indian brave's costume, was Master of Ceremonies. At apparently appropriate intervals he moulded the mass of swaying merry-makers to his will, directing them at one time to skate the wrong way, now to play ice-tag, now to become blatant with horns à la Woolworth.

Late in the evening the "chaotic crew" adjourned to Burwash Dining Hall which the class of '28 had arrayed in gay steamers and eerie lanterns. Mr. Stanley St. John staged a rapid-fire musical programme while the hungry revellers feasted. Chancellor Bowles, who may have been either patron or guest of honor, made an unusually happy speech, in the course of which he awarded the prizes for the Fancy and Original Costumes to Misses E. Potter and Muriel Redmond, and Messrs. Steele Sifton and Howard King. The evening concluded only after the crowd had erected and demolished a fantastic scheme of streamers, which almost completely enveloped the Dining Hall. I have no hesitation at all in saying that everyone is agreed that this carnival was infinitely more profitable than any insipid reception could possibly be. There is another question which accordingly arises—how can we remove the present taste-

“VICTORIA”

An address delivered at the Victoria College
Alumnae and Alumni Dinner, in
Burwash Hall

THURSDAY, JANUARY 29th, 1925

By

THE HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., F.R.S.C.



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VICTORIA

NOTHING can be more natural or more appropriate than that the sons and daughters of our common mother, Victoria, whom we at least of the older generations fondly call "Old Vic.," our beloved Alma Mater, should assemble themselves together from time to time in token of their appreciation of their common and glorious heritage.

And her history makes it not unfitting that, essentially Methodist as she is, one who is not a Methodist, but a Presbyterian, and who has taken no active part in the project of uniting his Mother Church with the Church of Victoria, should be selected to speak. For the very life and soul of Victoria lie in tolerance, broad-mindedness.

Goldwin Smith, who with all his failure to understand Canadian questions, had a singularly clear and accurate conception of world affairs, was wont to say—I heard him say it for the first time at a Victoria Convocation in Victoria Hall in the old Town of Cobourg, more than half a century ago (*eheu fugaces labuntur anni*)—that other Churches were founded in opposition to existing forms of religion, but the Methodist movement was founded in opposition to sin alone. John Wesley was an enemy only of sin. So Victoria was founded, not in opposition to any institution, existing or projected, but in opposition to ignorance alone—Victoria was and is an enemy of ignorance only.

The story of University education in this Province has not been adequately

told, nor do I propose here to attempt to tell it at all fully. But a few words may not be amiss.

John Graves Simcoe, our first Lieutenant-Governor, has often, absurdly enough, been hailed as the author of University education in Upper Canada—I presume it was on that hypothesis that "Simcoe Hall" was so named. Simcoe, on the contrary, did more than almost any other man to prevent a national university being an early possibility. A great soldier, a great administrator, patriotic to the core and wholly self-sacrificing, he came to Canada with the full and fully avowed purpose of making his Province a replica, as far as possible, of his native land. He looked upon the Church, upon religion and upon education rather as political agencies. I do not mean that he was a non-believer or an uneducated man—no one can read his letters (as I have read hundreds), but must see that he was a devout believer and a man of education. His religion is unfeigned and his language pure and appropriate—not lacking the apt quotation from Latin authors, in his time the characteristic of the educated. Nor are these an affectation; they appear in his private letters to his intimate friends, and are clearly with him familiar as household words.

His experiences in the Revolutionary War were in some respects unfortunate. He came to the conclusion that the Revolution was largely due to the want of an aristocracy; he would gladly

have made an hereditary aristocracy in Upper Canada if he could have found the material. In any suggestion of university education, it was the upper class, the aristocrat, which he considered. He had a horror, very common in his time, of the "enthusiast" in religion, the "sec-tary" who did not agree with him in his view of church government and of the proper staidness and formality to be observed in divine worship. He had got far beyond the stage, indeed, of my own ancestors a century before who, hanged for the Solemn League and Covenant, would gladly and conscientiously, in the fear and to the glory of God, have hanged their persecutors if they had had the power. But he thought, sincerely thought, that these "enthusiasts" were a danger to the State, a peril to British connection; he had persuaded himself, forgetting Washington, that those within his communion were the real Loyalists, and those without were at least to be watched. He did not hesitate to tell Presbyterians, when they asked that their clergyman, who was a Loyalist and had suffered for his loyalty to Britain's Crown, should be allowed to celebrate matrimony, as was his right in Scotland, that such a request indicated a wicked heart. With him, as with James I, the maxim was a truism: "No Bishop, no King."

Some of those of his time or a little later were wont to call Methodists, "Swaddlers," a name given them in Ireland from one of their preachers who frequently said that he honoured above all gods, the Babe in swaddling clothes in Mary's lap in the manger at Bethlehem. If I were a Methodist, as I am not, I think I should not object to being named after the Babe in swaddling clothes.

It followed as a natural and inevitable consequence that any scheme for a

university emanating from a virile Governor like Simcoe, with such sentiments honestly and consistently held, meant a university such as existed in England, wholly under the governance of one religious body and for the benefit of one social class. And it was Simcoe who first and definitely fixed in the programme of the governing class in the Province this conception of a state university, and thereby retarded for decades the cause of university education.

I do not propose here to trace the history, interesting as it is—suffice it to say that Victoria was founded to give those an opportunity for a higher education who refused to be bound by the theories and views of those in power. All honour to the founders of Queen's, our sister from the first; all honour, too, to the devoted teachers in the old King's College who showed themselves above sectarianism—but we Victorians may be allowed to honour the founders of Victoria, which opened her doors wide to those of all denominations. If her first graduate was a Methodist, her second was a Presbyterian; and it was one of the most cherished privileges of our old Convocations to see sitting side by side, Dr. Hodgins the Anglican, Dr. Ormiston the Presbyterian, and Dr. Nelles the Methodist.

It was not long before the Province rid itself of the old-world theories of its early Governors; but may we not have a modest pride in Victoria leading the way?

This is not the place or the occasion to tell the story of her progress and her work, her trials, troubles and successes. Her story has been written by competent hands and but awaits proper editing and arrangements for its publication. It is but little to our credit—the credit of the graduates of Victoria

—that the work of Dr. Burwash and Dr. Reynar remains a manuscript unprinted and practically unknown, awaiting the beneficence and *esprit du corps* of some lover of the old College and her great men of the past.

The work done in and by Victoria needs no laudation by me or by anyone—*si monumentum requiris, circumspice*. With means always stinted, the College always undermanned, her students “cultivating the muses on a little oatmeal,” her professors underpaid, she yet successfully strove to keep the light of education burning and the standard high. Her graduates were called upon to fill offices in Church and State, and feared comparison not at all; she filled a place honourable and honoured in the life social, religious and political of our land—and her children rose up and called her blessed.

The evil days came—the new Province of Ontario was poor and hard-pressed for funds; the Prime Minister and his Cabinet, looking round for means of retrenchment, saw the grant of \$5,000 to Victoria, and the axe fell.

So poor was Victoria that the loss of \$5,000 seemed almost a deathblow.

But there were giants in those days—I do not suggest that stature in the faculty has diminished—Dr. Nelles, Nathanael Burwash, Alfred Reynar, Abraham Bain, John Wilson, determined that Victoria should not die; and, deprived of State aid, with resources sadly curtailed, these men accepted pitiful salaries, set their shoulder to the wheel with faith in God and confidence in themselves, and carried her through her time of stress and danger with triumphant success. These were the times of Victoria as I knew her over half a century ago.

Before my undergraduate days were over the faculty was joined by Dr. Eugene Haanel, in many respects the

best and most inspiring teacher I ever knew. A German who left his native land because he could not bear the imperialistic views which were already becoming manifest, and which were a few decades later to plunge the world in blood and ruin; a man of profound and accurate knowledge who seemed to have taken all natural science for his province; a teacher who believed that what he taught should become part of the very mind of the student, not to be forgotten after a successful examination; an experimenter whose manipulation of apparatus was a delight to witness and the despair of those less expert; intense in his views, tolerant with mediocrity but intolerant of indifference and insincerity—his pupils have reason to thank their good fortune in being privileged to attend his classes. And he, too, gloried in his students. He to-day counts the days spent with his students in Victoria the happiest days of his life. He speaks still of the intentness of their expression in the endeavour to grasp what was being taught, which was an inspiration to him to make every effort to satisfy their longing for knowledge, and the great joy which filled his heart when he could see the clouds disappearing and comprehension making itself manifest by the clarified look which no teacher can mistake.

We, his old students, cannot forget, we wish him the enjoyment of many happy days in his *otium cum dignitate* of senescence in Ottawa.

The others of my teachers have passed over—yet remain dear to many hearts.

Dr. Samuel S. Nelles, the acute metaphysician and accurate logician, well read in classical and modern literature, of great learning, often concealed under the lively jest; deeply religious, but having no sympathy with gloomy reli-

gion—for religion was a joy and a delight to him—full of brightness and love for his fellow-man; to hear that he was to preside or to take part in a meeting was to know that the meeting would be a success. When he preached he was always sure of a large congregation; steeped as he was in the spiritual, his language was never sombre or his sentiments saddening; hating sin, he knew that sin was natural to man and he bore with the sinner in tenderness and love. In all his teaching, he kept in mind the future—not that his students should make money out of what they learned, but that it should be manifest in their lives. He never quoted our college maxim, but he lived it—*Studia abeunt in mores*. The value of what we learn is best shown by the life we live in consequence of it.

Dr. John Wilson, affectionately called “Old Trin,” a graduate of high academic standing of the Silent Sister, Trinity College, Dublin, saturated with the classics, which he considered the true Humanities—with a minute and severe grammatical knowledge, to whom a false quantity was a torture, but with a full appreciation of the grandeur and spirit of the Latin and Greek writers, giving an elegant and chaste English setting to the concise and difficult original, and impatient—so far as it was possible for so sweet a spirit to be impatient—with slipshod English as with inaccurate Latin, he taught his subject as a master, as he had learned them as a faithful student.

Abraham Bain as an undergraduate devoted most of his time to classics and the modern languages, taking only such modicum of mathematics as was necessary to entitle him to a degree—in those days classics and mathematics were the real University studies; all else might, indeed, be ornamental or

even useful, but classics and mathematics were the bread of life, the things needful, and about two-thirds of the undergraduates’ time was spent on them. When Dr. Kingston resigned and a successor was sought, Abraham Bain, then a tutor, undertook to qualify himself for the chair. He went to Harvard and worked through a severe course of training. Returning, he proved a competent and successful teacher. This but illustrates a favourite contention of mine, that mathematics is but clarified and systematized common sense and that any ordinary mind, with faithful application and proper teaching, can master the subject.

Professor Bain in his classroom was painstaking and patient—anxious to remove the difficulties his students found. No one hesitated to ask his assistance, and that assistance was always cheerfully and effectively given. A little severe in examinations, perhaps, but the rigour was wholly justified by his thoroughness in class.

He was, however, essentially a lover of literature and, faithful and successful teacher of mathematics as he was, it must have been a relief to him when the change was made; Victoria came to Toronto and he to the teaching of history.

Nathanael Burwash, a tower of strength to any cause, of whom it was said with much truth that he could teach any of the college subjects. I took with him such varied courses as chemistry, mineralogy, botany and Hebrew; and his pupils will bear witness that what he taught they knew if they cared to know. A devout Christian, but not afraid of truth wherever found, he held that the Almighty could not tell one story in this first work, His World, and another in His last, His Word; that if they seemed to conflict, one or the other must be misunder-

stood; that both must be studied reverently, but fearlessly, and any apparent contradiction must be removed by prayerful study and trustful prayer. In a generation in which Darwin and Huxley and Spencer were looked at by many with abhorrence, he held and taught that they must be listened to, but listened to critically and in the light of truth from other sources of truths as important as any they could bring. A great man, a great scholar, a great administrator, the world was poorer when Nathanael Burwash died.

Alfred Reynar, almost a kinsman, our professor of modern languages, a sound classic, thoroughly well read in the literature of France and Germany and a lover of our English classics—to hear him speak was a liberal education—his criticisms of our feeble efforts were kindly but trenchant; a mistake in rhetoric or orthography corrected by him was seldom repeated. His delightful personality and quiet humour made him a companion to be desired: brilliant in conversation, he never sought to outshine those with whom he consoled. But some will remember him not so much for his intellectuality, great as that was, as for his spirituality. No one could long be in his company but must take note of him that he had been with Jesus, not in the manner of him of whom this was first spoken, but in that of the disciple whom Jesus loved. A pure, loving and lofty soul characterized my friend who has gone—but one other man, and him in a different sphere of life, have I met in my three score years and twelve whose soul shone through its garment of flesh as did the soul of Alfred Reynar.

Such were the men under whose care and training were the students of the Old Victoria. *Ave et valete*, Nelles, Wilson, Burwash, Bain, Reynar.

And then came the revolution. "The Temple of Athene in the Athens of Canada"—thus I have, without mental contradiction, seen Cobourg designated in a Scottish paper—had its doors open to all the world, except to those of the sex of Athene herself. None of the learning of Minerva was to be imparted to a woman: women might attend collegiate institutes and normal schools and receive all such instruction as these could give; could be educated in not only the subjects of secondary schools proper but also the subjects of at least the first university year; they could teach in primary schools, in high schools, in collegiate institutes—but thus far and no farther. Some girls asked to be allowed to attend some of the classes—one of these is sitting at this table and her own girl is present, an alumna of Victoria. A class or two might safely be allowed to the young "female"; but more was to come.

A very brave woman of good education, who could not even plead the rashness of youth, Adeline Shenick, asked for a complete Victoria education, and a degree!

When this became known, there was a fluttering in the dovescotes of Cobourg—almost dismay, not unlike what would at the present time appear if it were suggested that a woman should become an ordained minister and fill a stated charge—unladylike, unwomanly, nay, unchristian—false to the modesty and proper reserve of the sex.

It is fair to say that it was not in academic circles that this sentiment was most manifest. The faculty seemed to take the request coolly, even sympathetically. Notwithstanding the woeful vaticinations of many good, honest, intelligent and earnest souls, the lady persisted and she got a degree.

And the world did not come to an end; things academic proceeded in the

same calm, philosophic way, and Victoria welcomed women to her halls and her degrees.

This change was a revolution, and it was to the advantage of all woman students, of Victoria and of Canada.

Her alumnæ have had no little to do, in this Province and Dominion at least, in correcting the laureate's dream of "sweet girl graduates with their golden hair." No doubt their coiffure may be a care and their hair a glory to them, but their chief care and glory are that they should be and are educated women, able and willing to do their share of the world's work.

When a university could do its full duty by teaching classics, mathematics, moderns, a little metaphysics and logic, when science could be taught by one man, the Cobourg Victoria could hold her own; but the day came when all that, much as it was, was not enough. The natural sciences became differentiated as is the case with all advance in nature or art. Geology claimed its own and was not satisfied to be taught by a chemist, scarcely even by a mineralogist or a palæontologist; physics demanded mathematics even more than experiment; physiology and zoology parted company, perhaps to the detriment of both, and botany refused to be a Cinderella neglected for her sisters. All this meant teachers, apparatus, room, money; and Victoria looked in vain for sufficient support. I was one of those who fought Federation to the last; I was one of those who refused to take part in the meeting of the Senate called for Toronto. I loved the Old Victoria and longed to have her remain in her historic seat.

But it was not to be—and I do not regret the change, made as it was against my strenuous opposition.

When the change was actually made, the opponents ceased all opposition and remained and remain loyal sons of Victoria in Toronto, as they were loyal sons of Victoria in Cobourg.

And she has made good: her worth is recognized and the University of Toronto would be distinctly poorer if Victoria were for any reason to depart—*absit omen*.

Her doors are still open to students of all creeds; and her students fraternize on equal terms with those of her sister colleges, University, Trinity, St. Michael's—her eye is not dim or her natural force abated.

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ENCOURAGEMENT OF THE SLAVE-TRADE

Much has been said and written of the callous greed of the American Colonies in their insistence upon Negro slavery and the African slave-trade. Most, perhaps all, of the blame may be deserved; but, to their credit be it said, some of the provinces did all in their power to check the latter, but were balked by the higher authority at Westminster in the interest of English trade. The Old British Empire, as it existed before it was rent in twain by the American Revolution to make way for the grander and better New British Empire, was frankly built on the model of the Roman Empire in which colonies and provinces were supposed to exist not for the benefit of colonists and provincials but of the mother country. Every act of any American colony was closely scrutinized with a view to its effect on English trade and commerce.

All the examples of interference by the Privy Council with colonial legislation which I shall adduce are during the decade before the Declaration of Independence and are taken from official sources.¹

Let us begin with the Old Dominion. Virginia, in April, 1767, having already an import duty of ten per cent on slaves brought into the colony, imposed a further duty of ten per cent payable by the purchaser. This was disallowed.²

The story is not very creditable to the home authorities. An act of 1728 for laying a duty on slaves imported into Virginia had been disallowed as harmful to English trade since it would work a practical prohibition of the importation of slaves into Virginia.³ In 1731, however, the governors of the American colonies were instructed to give the royal

¹ *Acts of the Privy Council of England—Colonial Series, Vol. V, A.D. 1766–1783*: London, *The King's Printer*, 1912, an instructive publication, admirably edited and printed.

² *Do. do.*, Vol. V, pp. 164, 165—August 12, 1768.

³ *Do. do.*, Vol. III, pp. 64, 65.

assent to laws laying moderate duties upon Negroes imported, provided such duties were paid by the purchaser, the colonial, and not by the importer.⁴ Virginia thereupon laid an import duty of ten per cent and this was suffered to pass; but an additional ten per cent laid in 1767 was too much; and this, as we have seen, was disallowed by the Privy Council at Westminster.

The Old Dominion did not relax her efforts to check the villainous traffic. In December, 1769, another act was passed imposing an import duty of fifteen per cent on slaves in addition to the existing duty of ten per cent and also payable by the purchaser. Now, the Privy Council recognized that the effect, as it was the obvious intention, would be the entire prohibition of the importation of slaves into Virginia. They also were now convinced both from principle and experience that the distinction between duties paid by the buyer and those paid by the importer was fallacious and the operation of either mode was the same. The former mode wherein the purchaser and not the slave trader paid the duty had "without Complaint from the Merchants of this Kingdom [England] universally prevailed in all Colonies which import Slaves"; and the Privy Council would not have interfered "had these Duties in the present Case been confined within the Limits of Moderation: But when the privilege of laying moderate Duties payable by the purchaser is extended so far as to have the effect of a prohibition, the objections made . . . in the year 1729 do stand forth in their full force and extent. For which Reason and forasmuch as the Merchants of Bristol, Liverpool and Lancaster have both by their Representatives and by Memorials stated . . . the prejudice which these Laws will be to the Trade and Commerce of those Ports . . .", they were disallowed, December 4, 1770. The governor was given specific instructions not to give the royal assent to any law increasing the import duty on slaves beyond the ten per cent already imposed.⁵

⁴ *Do. do.*, Vol. V, p. 287.

⁵ *Do. do.*, Vol. V, pp. 286-8, where the whole interesting story is told. It is somewhat amusing to note the absurd fallacy of the effect of the incidence of

The following year, an address by the House of Burgesses of Virginia was sent by Lord Dunmore, the Governor of Virginia, to Lord Hillsborough, Secretary of State, and by him to the Privy Council, who, December 19, 1771, referred it to the Board of Trade. This address humbly prayed His Majesty to remove all restraints from his governors which prevented them from "assenting to such Laws as might check the Importation of Slaves into the Colonies from the Coast of Africa, The Importation of such Slaves having long been considered as a Trade of great Inhumanity and under its present Encouragement, they have too much reason to fear will endanger the very Existence of His Majesty's American Dominions."⁶ This address does not seem to have been so much as considered until July 31, 1772; but in the meantime in April, 1772, an act was passed in Virginia laying an additional five per cent import duty on slaves. This, of course, under his Instructions, the governor could not assent to—and it was disallowed, April 7, 1773.⁷ The attempt was not renewed.

Georgia was not more successful. In September, 1773, an act was passed obliging masters of vessels and other transient persons, importing Negroes, &c., to pay tax for the same. It was in vain that the Assembly solemnly declared that it was not intended by the act to levy a duty but only to compel transient traders to contribute to the support of the Government of Georgia. The Board of Trade and their lawyer, Mr. Jackson, K.C., saw through the subterfuge, especially as a very great part of the expense of the Government of Georgia was "defrayed out of the Revenue of Great Britain." The act was disallowed, December 19, 1773.⁸

the duty upon the purchaser rather than the importer (or manufacturer) having force with the hard-headed group of men in Westminster; but it is not dead yet in all quarters.

⁶ *Do. do.*, Vol. V, p. 288.

⁷ *Do. do.*, Vol. V, pp. 362, 3.

⁸ *Do. do.*, Vol. V, pp. 403, 4. It may be of interest to note other legislation of Georgia as to slaves. By the Imperial Act of 1732, 5 George II, c. 7, s. 4, Negroes in the American plantations were made real estate—See my article *The Slave in Canada*, JOURNAL OF NEGRO HISTORY, V (July, 1920), p. 13, n. 12. And it was the policy of the American Colonies to make slaves real estate descendible

Pennsylvania was no more fortunate. In February, 1773, she passed an act levying an additional import duty of £10 on every slave. The Board of Trade said that it was "probably intended as a prohibition on this article of trade—to the prejudice of a very important branch of British Commerce"; and it was promptly disallowed, July 6, 1774.⁹

Even Jamaica had the same experience. Her act of February, 1774, imposing an additional duty of 40 s. a head on slaves imported, payable by the importer, was disallowed, February 27, 1775, the merchants alleging "that this additional Duty is such a Burthen having already amounted to upwards of £15,000 upon twenty-six Cargoes that without Your Majesty's Interposition for their relief they can no longer with any hope of gain carry on the Slave Trade to that Island." ¹⁰

Some of the horrors of the slave-trade are incidentally made to appear. For example in an appeal by Jasper Hall, merchant of Kingston, Jamaica, in 1768, it appears that he had his agent in England fit out a ship for the coast of Africa for a cargo of slaves to put in at Jamaica for orders whence to convey them, but not to sell them on that island. The ship took on a cargo of slaves and arrived at Jamaica in October, 1762. She was leaky, and some of the slaves were sickly and wanted landing for the recovery of their health. They were landed at Kingston "to the number of 630, many of whom being taken with the Small Pox and 400 Inoculated, they necessarily continued in the Island till the January following, when all that remained alive, being but 521 were . . . re-

to the heir with the land. In 1766, however, Georgia made slaves chattels personal. This act seemed objectionable to the Board of Trade and their counsel, Sir Mathew Lamb, as thereby the slaves "might be separated and taken from the lands, so that the plantations might sink and become useless in the hands of the heir for want of the slaves that would be taken therefrom." The act was accordingly disallowed, June 26, 1767: *do. do.*, Vol. 5, pp. 40, 41. A similar act of Virginia in 1752 had been disallowed: *do. do.*, p. 177. In 1771, the Governor of Georgia asked for Instructions, and he was instructed to assent to a bill making slaves chattels personal as in the neighboring colony of South Carolina: *do. do.*, pp. 176, 7.

⁹ *Do. do.*, Vol. V, pp. 398, 9.

¹⁰ *Do. do.*, Vol. V, pp. 406, 7. It will be observed that 7,500 slaves were imported into Jamaica within the year, an average of 288 to a ship.

shipped . . . for the Havannah”¹¹ It is appalling to think of one hundred and nine unfortunates meeting death by disease in this way, and yet they may have been more fortunate in escaping the fate of the survivors sent in slavery to Cuba.

WILLIAM RENWICK RIDDELL

OSGOODE HALL, TORONTO,

October 2, 1926.

GENERAL NOTE

It is not to be supposed that the interference with the colonies began only a very short time before the Declaration of Independence. Some account of transactions in earlier times concerning the Colonies, and more or less germane, is added here.

VIRGINIA

Virginia as early as 1710 and again in 1718 passed acts which laid a duty of £5 per head on Negroes imported. These were found to reduce the number usually imported and considered necessary for the colony and “a hindrance to the Negro trade as well as a burden upon the poorer planters.” They were, however, not so serious as to call for action by the home government. But in 1723, another duty, though less in amount, being 40/— per head, was provided for by an act which came up for consideration by the Privy Council, this being referred to the Board of Trade Committee of the Privy Council. The Board of Trade reported that it would “Discourage the Planting and Cultivating Navall Stores especially in the two new Counties where great Numbers of Negroes will be wanting”; and, April 17, 1724, recommended the disallowance of the act: it was disallowed accordingly, April 30. *Do. do.*, Vol. III, p. 64.

January 29, 1726, Samuel Jacob and other British merchants complained of being forced to pay duty about April 30, 1724, on certain Negroes imported notwithstanding the disallowance of the act: *do. do.*, p. 123.

¹¹ Although Hall refused to sell any of the slaves in Jamaica, when he came to reship them, Malcolm Laing, the Receiver General of the Island, demanded 10 s. a head duty on the 630 landed—£315—and 20 s. a head on the 521 exported—£521, £836 in all. Hall paid under protest and sued for the money. The trial court, July, 1763, gave him judgment; but this was reversed, August 16, 1766, by the Court of Appeals: Hall appealed to the King in Council and his appeal was allowed, July 15, 1768. *Do. do.*, pp. 52-55. He sold the slaves in Hispaniola, the market in Havana being a monopoly.

An act of 1723 concerning servants and slaves was disallowed, August 29, because it would amount "almost to a prohibition of the transportation of felons from Great Britain"—*do. do.*, p. 55.

[In 1748-9, Virginia was allowed to make Slaves personal estate, repealing an act of 1705 and two later acts making them real estate. *Do. do.*, Vol. IV, pp. 131, 2, 8, 9.]

Another act placing a duty of 40 s. per head on imported Negroes passed in 1728 met the same adverse report, July 31, 1729, as it "would discourage the trade of this Kingdom (*i.e.*, England) with Virginia, raise the price of tobacco and discourage settlement in the two new counties for want of sufficient slave labour": it was disallowed, August 18. *Do. do.*, pp. 64, 65. The new counties were Spotsylvania and Brunswick, *do. do.*, p. 244; the former called after Colonel Spottswood: *do. do.*, p. 246.

GEORGIA

An act had been passed by Georgia for rendering the colony more defensible by prohibiting the importation and use of black slaves or Negroes except under special restrictions and regulations. In 1750, legislation was passed for the repeal of this act. The matter was referred to the Board of Trade, November 18, 1750. *Do. do.*, Vol. IV, pp. 107, 108.

SOUTH CAROLINA

An act passed August 20, 1731, to impose an import duty on Negroes of £10 per head was disallowed as excessive. *Do. do.*, pp. 393-5.

NEW YORK

A New York act in 1734 imposed an import duty of "five Ounces of Seville, Pillar or Mexico Plate or Forty Shillings in Bills of Credit of that Colony . . . on every Slave (Male or Female) of four years of age and upwards imported directly from Africa"—from any other place, £4, payable by the importer. This, though questioned, was allowed to come into force. *Do. do.*, Vol. III, pp. 422, 423.

Not as bearing upon our subject but as of interest from another point of view, I note an act of *Antigua*.

ANTIGUA

This Island passed an act, September, 1744, to prevent Papists settling, as it required certain oaths within three months of any

person's arrival which they could not take: and it also punished anyone who encouraged any Papist to reside upon the Island " . . . by hiring or purchasing them as Servants or leasing them or giving them any Lands to dwell on." The act was disallowed, November 28, 1746. *Do. do.*, Vol. IV, pp. 73, 74.

JAMAICA

Two acts of Jamaica, complained of in 1724, seem to have been purely revenue acts as not only was a duty imposed on import but also on export of Negroes. *Do. do.*, pp. 72. In two years the export duty of the South Sea Company amounted to £4737. But they were complained of by the South Sea Company and Merchants trading to Jamaica who said 15 s. per head on import and 30 s. per head on export was "a Burthen to British Trade and Navigation." The Assembly then reduced the duty to 10 s. and 20 s. respectively for import and export. This also was disallowed, October 13, 1732. *Do. do.*, pp. 159-162. August 1, 1733, the Assembly levied a duty of 10 s. per head on all Negroes imported and unsold and also on all to be imported—the South Sea Company and Merchants of London, Bristol and Liverpool appealed against the Bill and it was disallowed, May 10, 1735; but a reasonable import duty was authorized to be imposed. *Do. do.*, pp. 164-167. (An act of July 13, 1730, to render "free Negroes and Mulattoes more useful," by making them work, was disallowed, November 25, 1731, as "destructive of former laws in favour of Negroes freed for faithful services and particular merit . . . and their descendants." *Do. do.*, pp. 344, 345.)

In 1754, a Mr. Fornichon, who from ignorance of the laws of Jamaica had employed another's slave and been sentenced to a fine of £50 and imprisonment for a year, was let off his fine. *Do. do.*, Vol. IV, pp. 270, 271.

In 1766, by the Act 6 George III, c. 49, ss. 5, 12, Jamaica and Dominica were permitted to export Negroes brought in by British ships, Jamaica charging an export duty of £1 10 for each Negro exported in a foreign vessel; but Dominica could charge only an import duty to the same amount.

The Act of 1773, 13 George III, c. 73, s. 4, repealed these provisions and substituted an import duty of 2 s. 6 d. on each Negro brought into Dominica and a similar export duty for Jamaica.

ST. VINCENT

An act of 1767-8 levying a tax on lands and slaves was considered May 24, 1771, and adversely criticized: *do. do.*, Vol. V, pp. 302-306.

GRENADA

In 1769, a complaint was laid before the Privy Council against Robert Melvill, the Governor of the Island, alleging *inter alia* that he "did permit John Graham, Peter Gordon, and other Justices of the peace of the Island of Grenada, to use the severest and most Cruel Tortures upon the Bodies of five Negroes Suspected of Committing Murder, and this with a view to induce them to confess the said Crime and to accuse their Master Monsieur La Chancellerie; which Accusation after repeated Tortures was actually extorted from them, and the said La Chancellerie was thereupon apprehended and imprisoned and they, the said Negroes Condemned to death upon their own Confession thus Extorted; which Sentence would probably have been executed upon the said Negroes if the most respectable Inhabitants of the Colony had not remonstrated against such illegal and unnatural proceedings, which occasioned a delay of their execution, until the Matter was represented to the King's Ministers, who ordered the prisoners to be Liberated nevertheless three had died from injuries they had received by the Torture together with their long Confinement before the said Order arrived; Notwithstanding which the said Justices were still continued by the said Robert Melvill in the Commission of the peace." *Do. do.*, Vol. V, at p. 226. It does not appear what was the result.

That the inhabitants of some at least of the colonies were not unanimous in the desire to prevent the further importation of Negroes can be seen from the following:

PENNSYLVANIA

The Assembly early in 1761 passed a Bill intituled "An Act for laying a Duty on Negroes and Mulatto Slaves imported into this Province": this was laid before the Lieutenant-Governor James Hamilton for his Assent, February 28, 1762. At the same time a petition was presented in the following terms:

"A Petition from the Merchants against the Bill for Duty on the Negroes.

"To the Honourable JAMES HAMILTON, Esquire, Lieutenant Governor of the Province of Pennsylvanie, &c., &c.,

'The Petition of Divers Merchants of the City of Philadelphia, Trading to His Majesty's Coloneys in the West Indies, 'Humbly Sheweth:

'That we are informed there is now a Bill Before your Honour for your assent, laying a Duty on the importation of Negros, and that it is to take place immediately on the publication.

'We, the subscribers, ever desirous to extend the Trade of this Province, have seen, for some time past, the many inconveniencys the Inhabitants have suffer'd for want of Labourers and artificers, by numbers being inlisted for His Majesty's Service, and near a total Stop to the importation of German and other white Servants, have for some time encouraged the importation of Negros, and acquainted our friends and correspondents in several parts of His Majesty's dominions (who are no Way apprehensive of a Bill of this Nature), that an Advantage may be gained by the Introduction of Slaves, which will Likewise be a means of reducing the exorbitant price of Labour, and, in all probability, bring our Staple Commoditys to their usual prices; And as many of us have embarked in this Trade through the motives before mentioned, We humbly beg your honour will take into consideration the hardships we shall Labour under by such a Law taking immediate effect, when we have it not in our power to countermand our Orders or advise our friends; therefore humbly pray that such time may be allowed (before the Law takes place) as your honour shall think most Conducive to extricate your petitioners from the impending danger.

'Philadelphia, 1st March, 1761.

'John Bell,
Humphry Robinson,
Reed & Pettit,
William Coxe,
Charles Baths,
Philip Kearney, jr.
James Chalmers,
Joseph Wood,
Willing, Morris & Co.,
Thos. Riche,
David Franks,
Hu. Donnaldson,

Benjamin Levy,
Henry Harrison
John & Jos. Swift.
John Nixon,
Daniel Rundle.
Francis & Relfe,
Stoker & Fuller,
Scott & McMichael,
John Inglis,
David McMurtrie,
Saml. & Archa. McCall.
Joseph Marks.'"

The Bill named Richard Pearne as the collector of these duties and the Lieutenant-Governor returned it for amendment by striking out this unconstitutional provision, March 10: the amendment was made and the bill again, March 14, laid before the Lieutenant-Governor and assented to, April 11, 1761. *Minutes of the Provincial Council of Pennsylvania*, Harrisburg, 1852, Vol. VIII, pp. 575, 576, 578, 583, 601.

While this act with others of the same year was referred by the Privy Council to the Committee for the Plantations, it was allowed to come into effect; *Acts. &c.*, Vol. IV, p. 808.

That being a Negro Slave was not in old Pennsylvania wholly without its advantages may be seen from the following extract from the Minutes of the "Council held at Philadia, the 25th of february., 1707" (February 25, 1708) "A Petition from Wm. Righton & Robt. Grace, directed to the Govr. alone, being presented to him, the Govr. thought fitt to lay it before the Council, and desire their advice therein. The matter of which Petition was, That Toney, a Negroe Slave of the said Righton, and Quashy, a like Slave of the said Grace's, were lately at a Special Court held for that purpose in this Town, condemned to Death for Burglary proved agst. them; But for asmuch as it will be of very great Damage to the Petitr. should their sd. slaves lives be taken, since there is no provision in this Govmt. as is Usual in other places, for a Competent restitution to the Owners who lose their Slaves by the hand of Public Justices.

" Therefore, the humbly pray, that in Mercy to the said Owners the lives of their slaves may be spared, & that they may be suffered to transport them, & instead of Death, that they may have the Liberty to inflict on ym. such Corporal Punishmt. as may be requisite, for a Terror, to others of their Colour, wch the said Owners will take care to have duly executed upon ym." "All wch being taken into Consideration, the Board thought fitt to give it as their Opinion, that the Death of these Slaves would be a greater Loss to the Owners than they could well bear, and therefore seeing there is no Provision made for restitution for the Loss by the Publick, it may be as convenient to make the Slaves Examples of Terror to others of their Complexion, by a most Severe Corporal Punishmt., and that the Petitioners may have Liberty to transport them as requested.

" And it is hereupon Resolved, that the Owners may have Liberty to punish their Slaves, notwithstanding the Sentence of Death pass'd upon them, wch in case they will perform in the

following Manner; the said Sentence shall be taken off, and their Owners shall transport them to their own benefit and advantage.

“ That the Punishment shall be as follows: They shall be led from the Market place, up Second Street, & down thro’ the front street to y Bridge, with their arms extended & tied to a pole across their Necks, a Cart going before them, and that they shall be severely Whipt all the way as they pass, upon the bare back and shoulders; this punishmt. shall be repeated for 3 market days successively; in the meantime they shall lie in irons, in the prison, at the Owners Charge, untill they have such an Opportunity as shall best please them for transportation; All of which being duly perform’d, the Sentence of Death shall be entirely remitted.” *Minutes of the Provincial Council of Pennsylvania*. Philadelphia, 1852, Vol. II, pp. 405, 406.

There was trouble in earlier times over Sunday meetings of Negroes in Philadelphia. We read the following minute of an item of business at a meeting of “A Council Held at Philadelphia on a Tuesday, the yth (11th) of July, 1693”:

“ Upon the Request of some of the members of Councill, that an ordr made by the Court of Quarter Sessions for the Countie of philadelphia the 4th July instant, (proceeding upon a presentment of the grand Jurie, for the bodie of the sd Countie,) agt the tumultous gatherins of the negroes of the towne of philadelphia, on the first dayes of the weeke, ordering the Constables of philadelphia, or anie other person whatsoever, to have power to take up negroes, male or female, whom they should find gadding abroad on the said first dayes of the week, without a tickett from their Mr., or Mrs, or not in their Compa, or to carry them to goale, there to remain that night, & that without meat or drink, & to cause them to be publickly whipt next morning, with 39 Lashes, well Laid on, on their bare backs, for which their sd Mr., or Mrs. should pay 15d to the whipper att his deliverie of ym to yr Mr., or Mrs. & that the sd order should be Confirmed by the Lievt. Governor and Councill.

“ The Lievt. Governor & Councill Looking upon the sd presentment to proceed upon good grounds, & the ordr of Court to be reasonable & for the benefit of the Inhabitants of the towne of philadelphia, & that it will be a means to prevent further mischeifs that might ensue upon such disorders of negroes, doe ratifie & confirme the same, & all persons are required to put the sd ordr in execu’n.” *Do. do.*, Vol. I, pp. 380, 381.

A Letter Addressed to Two Great Men (Pitt and Newcastle)

By

THE HONOURABLE
WILLIAM RENWICK RIDDELL,
LL.D., F.R.S.C., ETC.

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“A Letter Addressed to Two Great Men” (Pitt and Newcastle)

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

There were stirring times in England in the winter of 1759-60.

The Seven Years' War, begun in 1756 to cripple the Prussian Frederick the Great, was raging. Britain was supporting him with subsidies so substantial that her best financiers felt alarm; and she was waging war against ambitious France on her own account. The victory of Wolfe at Quebec was not yet followed by the Capitulation of Montreal; but in the West Indies while Martinique had successfully resisted the attack, Guadeloupe had succumbed to British arms; the French fleet could no longer keep the sea in East or West; after the disaster at Quiberon no more was heard of an invasion of the Island Kingdom.

At London there was in power the Ministry of Pitt and Newcastle, detested by the King but accepted for fear of worse. This Ministry was sincerely desirous of peace if the King was not; and, on the opening of the Seventh Session of the Eleventh Parliament of Great Britain, November 13, 1759, Lord Keeper Henley read the Speech from the Throne, saying: “As His Majesty entered into this war not from views of ambition so he does not wish to continue in it from motives of resentment—the desire of His Majesty's heart is to see a stop put to the effusion of Christian blood.”¹

There was much discussion as to what part—it was not thought that all—of the conquered territory should be retained by the victor on the peace.

Then was written and published a small pamphlet of fifty-six 8 vo. pages at the price of one shilling, which is now one of the rarest of documents and worth sixty.² It is in itself a noteworthy production, but it is chiefly as being the occasion and ostensible cause of Benjamin Franklin's celebrated Canada Pamphlet³ which played such a great, perhaps a decisive, part in determining British statesmen to retain Canada though it was but a “few arpents of snow” and to give up Guadeloupe though it produced £300,000 sterling worth of sugar every year. Franklin's pamphlet has been frequently discussed but not its forerunner; and the purpose of this paper is to say something of the earlier document. “A Letter to Two Great Men.”⁴

It is understood to have been written by the Reverend John Douglas, D.D., who, born in Fifeshire, educated at Dunbar and at St. Mary's Hall and Balliol, Oxford, received Holy Orders in the Church of England and after some service as Chaplain in the Army settled down in civil life as a clergyman of the Church of England; he was tutor to Lord Pulteney, son of the celebrated William Pulteney, first Earl of Bath, who had, when still a Commoner and afterwards when a Peer of the Realm, played no small part in public affairs—Secretary at War

under George I, he was refused office by Walpole whom he thereafter opposed; he was

Billy, of all Bob's foes
The wittiest in verse or prose.

A "Patriot" with Wyndham, of the "Country Interest" with Bolingbroke, a friend of Frederick, Prince of Wales, he refused the Premiership under George II but accepted a Peerage—then when willing to form a government he was unable to do so and Pelham resumed the reins of power. Bath remained of the Privy Council but he was an extinct volcano or, as a political foe called him, "an aged raven" from 1746 or a little later. He still did not understand that he was a spent force and exhibited as late as 1760 great interest in public affairs.

Bath was a patron of the Rev. John Douglas; he gave him a Vicarage in Shropshire and in 1758 the Perpetual Curacy of Kenley; the clergyman lived most of the time near or with his patron whom he served as private chaplain.

Douglas was a skilled writer who had successfully defended Milton from the charge of plagiarizing the modern Latin poets Taubmann and Stapporstius which had been brought against him by William Lauder, himself a literary forger; he wrote other creditable works and was a little later to take part with Johnson in exposing the "Cock Lane Ghost"; he became Canon of St. Pauls, Bishop of Carlisle, Dean of Windsor, dying in 1807. His was the hand that wrote the Letter but Bath inspired the effort and almost certainly was the real author.

The author begins with an appeal to the two great men, Pitt and Newcastle, to pay attention to his suggestions as "a true Friend to Old *England* and a sincere Lover of my Country"; he has long thought that the Ministers of State may be assisted by persons not at the Council board; and at the time those who direct the Cabinet do not receive the assistance in the Houses of Parliament which their predecessors in power used to receive. "You, my Lord, of late scarcely hear any Speech in the House of Lords but that of a Lawyer on a Scotch appeal,⁵ and you, Sir, . . . remain single on the Field of Battle . . . your Speaker takes the Chair only to vote Millions and levy thousands without the least Debate or Opposition."⁶

He then points out the "distressed condition of France fallen from its alarming power and greatness into the lowest state of distress and impotence, unfortunate in its military operations in every quarter of the globe, beaten all Europe over by sea and land, its fleets sailing only to be destroyed, its armies marching only to run away, without trade, no credit, stopping payments, protesting bills and to all intents and purposes a bankrupt nation, the King, the Princes of the Blood, the Nobility and the Clergy, carrying in all their plate to be coined for the present extreme exigency of their affairs, disappointed and baffled in all their schemes on the Continent and taught to think no more of invasions by the destruction of the only fleet they had left⁷ . . . unable to carry on the war, France must soon be reduced to the necessity of suing for peace. And we have had bloodshed enough."

Quoting "the paragraph of His Majesty's Speech from the Throne at the opening of this Session" which has been already mentioned, and stating that "the readiness of England and Prussia to enter into a Treaty⁸ and to give peace

to Christendom" which "Prince Lewis of Wolfenbuttle" had been authorized to communicate to the French Minister at the Hague, "would, no doubt, open the door for a negotiation," the author offers his considerations.

First, choose the proper persons as Plenipotentiaries. Casting his eyes round, he is surprised and still more grieved to find so few "capable of conducting the arduous task of making peace"; this may be due "to neglect in the education of our Men of Quality." The qualifications which would "fit them for Statesmen have been neglected in comparison of such as fit them for Arthur's or Newmarket"—for the Club or Race-course. Or it may be due to the policy systematically followed of late years of giving places to the unfit. Whatever the cause, "it is a matter of amazement that there should be so few in this Island who have given any proofs that they are capable of conducting with ability, much less with dexterity, this important business of a negotiation with France."⁹ France outwitted England at Utrecht;¹⁰ and it is to be hoped that "A Treaty of London, in (proper) hands will make ample amends for our wretched management at Utrecht."

But in any case, France cannot be trusted to keep her word—"Gallic faith is become proverbial and the neighbors of France can reproach her with innumerable instances of a most profligate disregard to the most solemn treaties." And we need not suppose that nation to be more perfidious than others; "the power, the populousness, the extent, the strength of the French Monarchy free it from fear and so have too frequently tempted . . . to the most shameful and bare-faced instances of national breach of faith."¹¹ Instances are given. By the Peace of Westphalia,¹² Alsace was ceded to France, and as to the ten Imperial Cities in Alsace, France expressly agreed that they should retain their privileges and liberties—"Le Roi de France ne s'arrogera sur les Villes de la Prefecture que le simple droit de protection, qui appartenoit a la Maison d'Autriche." But the ten Imperial Cities were soon humbled to receive the French yoke equally with the rest of Alsace; and they remain, now, lasting monuments—what others may expect from "power unrestrained by justice."

By the Treaty of the Pyrenees,¹³ France bound herself from further encroachment on Spanish territory in the Low Countries; hardly seven years later, she attacked Flanders.

The Peace of Nimeguen¹⁴ was hardly signed when France surprised Strasburg and blockaded Luxemburg, "showing a wantonness of perfidy as no history of the most barbarous and unpolished Savages could well exceed."

Then the "Partition Treaty . . . solemnly ratified and agreed to preserve tranquility in Europe . . . was no sooner made than it was shamefully abandoned by . . . France . . . the letter . . . was violated they must own but the spirit of it was what ought to be attended to! And by such a comment worthier of a pitiful Sophister than of a Most Christian King, his grandson was assisted in placing himself on the Throne of Spain".¹⁵ "Lewis the XV" is as bad as his grandfather. The Treaty of Vienna¹⁶ had given France Lorraine by means of the Pragmatic Sanction, France to assist the Queen of Hungary; but in a very few years, France overran Germany with her armies, assisting the Elector of Bavaria in an attempt to overturn the Pragmatic Sanction and dethrone the Queen. And England did not escape:

By the 12th Article of the Treaty of Utrecht, "all Nova Scotia or Acadia with its antient Limits and with all its dependencies, is ceded to the Crown of Great Britain"; and by the 15th Article, "The subjects of France, inhabitants of Canada and elsewhere shall not disturb or molest in any manner whatever the Five Indian Nations which are subject to Great Britain nor its other American Allies".¹⁷

The French as early as 1720, seized and fortified Niagara in the Five Nation Country;¹⁸ and thereby became masters of the lakes and could at leisure extend themselves along the Ohio and down the Mississippi; they, in 1731, erected a fort at Crown Point which is either in the centre of the Five Nations or in the Colony of New York.¹⁹

As to Nova Scotia, they gave "us a specimen of chicane worthy of those whom no Treaty ever bound"; they claimed that only the Peninsula was meant²⁰ and they made incursions even into the Peninsula.

Then by the 9th Article of the Treaty of Utrecht, the French King agreed to demolish the fortifications of Dunkirk within five months;²¹ instead of doing so, he actually repaired the sluices and built a new canal; and the importance of Dunkirk was shown before the existing War began, when its harbour was "crowded with transports to embark Count Saxe and the Pretender to invade us." During this war it was still more dangerous.

Therefore, before even entering upon any new Treaty, Englands hould insist on the former Treaties being implemented; and as the French required Britain to send two Peers of the Realm as hostages for the surrender of Louisburg, so now if there is to be an armistice, "I do not see why the curiosity of our Londoners should not be gratified . . . and two Ducs and Pairs of France . . . sent as hostages to England till Dunkirk ceases to be a Port."

Then "the War having begun principally with a view to do ourselves justice in North America," do not give up any of the conquests there—"the rashness of Braddock, the inexperience of Shirley, the inactivity of Loudoun and the ill-success of Abercrombie"²² have done enough harm; but do not give up anything in America; retain Louisburg, Cape Breton, Quebec, all Nova Scotia to its old limits, Crown Point, Niagara, Fort du Quesne, the country of the Ohio—do not leave the French at "Montreal or the Three Rivers," do not give them an "opportunity of elbowing all our Colonies round about."

"The truth of the matter is, they were tired of Canada. The inclemency of the climate, the difficult access to it, and a trade scarcely defraying the expense of the Colony would long ago have induced them to abandon it if the plan of extending its boundaries at the expense of the English and of opening its communication with Louisiana and with the Ocean had not made them persevere." Keep them out of the Continent entirely.

Then, as to the conquests outside of "North America which must be kept all our own," they may be given back to France as "a most important consideration to extricate the King of Prussia from any unforeseen distresses".²³

The remainder of the Letter is given up to generalities; the author is glad that the Ministry has got rid of "a set of very useless or very pernicious gentlemen called Mediators. . . . Nothing can be more ridiculous than the

figure of the Pope's Nuntio and the Ambassador of Venice acting the farce of mediation at Münster,²⁴ for several years while the war went on till its events regulated the terms of peace."

Then as to the language to be employed in the Treaty; French perhaps is the only language in which the Plenipotentiaries can converse, but when it comes to writing, Latin should be employed—"neither the honour nor the interest of the State ought to allow us to accept of the original treaty in the native language of our enemies." Moreover, accepting such a document in French would be "laying the foundation for future cavils." Cardinal Mazarine boasted of out-witting Don Louis de Haro in the Conference at the Pyrenees;²⁵ and in the Capitulation of the Dutch Garrison of Tournay in 1745, the Dutch believed that they were agreeing to refrain from acting in any of the Barrier Towns, but the French succeeded in tying them up from acting in any part of the world however remote.²⁶

These are the arguments and the suggestions—"if they are not worth your notice, as I am an anonymous writer and hope never to be known I can neither lose nor gain reputation by them. All I can say, if they are neglected, is *Operam et olean perdidit*."²⁷

NOTES

¹15 Parliamentary History of England, p. 949; the Session opened November 13th, 1759, and closed May 22nd, 1760. This was the last Parliament of George II; he died October 20th, 1760, "Without any previous disorder . . . he fell on the floor . . . An attempt was made to bleed him but without effect . . . his malady was far beyond the reach of aid, for when the cavity of the . . . chest was opened . . . the surgeons . . . found the right ventricle of the heart actually ruptured and a great quantity of blood discharged . . . into the pericardium, so that he must have died instantaneously." It is not possible to determine with exactness when the "Letter" was written. The Declaration of Ryswick, November 25th, 1759, (15 Parl. Hist., p. 1019) had been made but was not known to have yet been communicated to France. The "Letter" was certainly written after November, 1759, and before May 22nd, 1760. Watts' *Bibliotheca Britannica* gives the date 1759, others, e.g., D.N.B., 1760—*nil interest*.

²I have known of only one copy for sale in the forty years I have been looking for it. I bought it—*mea culpa, mea maxima culpa*—and have placed it in "The Riddell Canadian Library" at Osgoode Hall for the use of students of Canadian History.

³There were two editions of Franklin's pamphlet published; one in 1760 and a second (with slight changes) by Becket in 1761—the title: *The Interest of Great Britain Considered with regard to her Colonies, &c.* Both editions are rare, the former especially so (my copy cost me £8); the second is reprinted in *The Works of Benjamin Franklin* in 3 vols., printed for Longman, Hurst, Rees and Orme, London, n.d., Vol. 3, pp. 89, sqq.

⁴I know of but one edition; it has on the outside page of the paper cover the title: "A | Letter | addressed to | Two Great Men | (Price one shilling)." The title page is more elaborate, it reads:—

"A | Letter | Addressed To | Two Great Men, | on the | Prospect of Peace | and on the Terms necessary to be insisted | upon in the NEGOTIATION | *Mea quidem sententia, paci, quae nihil habitura sit insidiarum | semper est consulendum | De Offic. Lib. 1.* |

There is a Tide in the Affairs of Men,
Which taken at the Flood, leads on to Fortune;
Omitted, all the Voyage of their Life
Is bound in Shallows and in Miseries
On such a full Sea are we now afloat,
And we must take the Current when it serves,
Or lose our Venture.

—Shakesp.

London | Printed for A. Millar in the Strand | MDCCLX."

⁵It must be remembered that in 1760 and for many years thereafter members of the House of Lords who were not lawyers sat to hear and decide appeals from the Law Courts of England and Scotland. Even as late as 1834, lay peers constituted a House of Lords to hear an appeal; the last occasion was June 17th of that year (*Ricketts v. Lewis*, (1834), 2 Clark and Finely, *House of Lords Reports*, p. 100); in 1844, when the celebrated O'Connor case came on for decision, some non-legal peers attempted to vote, but on the President of the Council (Lord Wharncliffe) expostulating, they withdrew. Lord Wharncliffe said (speaking of the Law Lords): "In point of fact . . . they constitute the Court of Appeal, and if noble lords unlearned in the law should interfere to decide such questions by their votes instead of leaving them to the decision of the law lords, I very much fear that the authority of this House as a court of justice would be greatly impaired." In 1883, in the case of *Bradlaugh v. Clarke*, (1883), 8 A.C., 354, the second Lord Denman attempted to vote, but his vote was ignored. I have myself seen him sitting in the House with the Law Lords on the hearing of an Appeal, but absolutely no attention was paid to him; he was a well-known "eccentric" who died in 1894, in his 90th year. The curious in this matter may consult *17 Law Quarterly Review*, pp. 367-370; Courtenay's *Working Constitution of the United Kingdom*, London, 1901, pp. 102, 103; Holdsworth's *History of the English Law*, Vol. 1, pp. 187, 188.

⁶The Supplies voted for 1760 amounted to £15,503,563.15.9½; and the remarkable fact is noted under date, January 28th, 1760; "During this Session there was no debate on any public measure in either House of Parliament," *15 Parl. Hist.*, p. 965; but Laurence Earl Ferrers, "a nobleman of a violent spirit," was tried by the Court of the Lord High Steward for murder, resulting in his conviction, April 18th, and his execution, May 5th, 1760; the only defence was insanity.

⁷At the Battle of Quiberon, November 20th, 1759, where the strength and spirit of the French fleet were so effectually shattered that it did not make its appearance again during the war.

⁸The reference is to the Declaration of Ryswick, November 25th, 1759—*15 Parl. Hist.* 1019—that "their Britannic and Prussian Majesties" were "ready to send Plenipotentiaries to any place . . . to treat concerning a general and firm peace"—the Allies, France, Austria, Sweden, Russia, and Saxony, suggested Augsburg; this was agreed to; and France, July 15th, 1761, spontaneously offered to cede Canada. Considerable negotiations took place; France sent an ultimatum, August 5th, 1761; Britain replied, August 16th, and negotiations were broken off for a time. *15 Parl. Hist.*, pp. 1019-1071—(most interesting reading).

⁹Pitt seems to have agreed; he conducted most of the negotiations himself.

¹⁰The Treaty of Peace and Friendship between Great Britain and France, signed at Utrecht, March 31st., 11th April, 1713, which put an end to the war of the Spanish Succession.

¹¹"Scrap of paper" national morality—the charge made by every antagonist against the other and "Punica fides" of old becomes "Gallica fides," "Perfide Albion," &c., &c.

¹²The Treaty of Westphalia, October 24th, 1648, ended the terrible Thirty Years' War; it gave Holland and Switzerland independence, Sweden was rewarded in money and territory, France received the Landgravates of Upper and Lower Alsace and the Prefecture of the ten Free Imperial Cities. France did not keep her undertaking; she insisted on actual ownership of, not simply suzerainty over, the Free Cities.

¹³The Peace of the Pyrenees between France and Spain, November, 1659, was expected to end the trouble as to the Spanish throne; Spain ceded much of the Low Countries, &c., to France; a marriage was arranged between Louis XIV and the daughter of Philip IV, Maria Theresa, Infanta of Spain.

¹⁴The Peace of Nimeguen (*Nijmegen*, *Nimwegen*), a series of Treaties in 1678 and 1679, ended the wars which arose out of Louis XIV's attempt to seize Holland; France gave back most of the territory she had overrun. In 1680, the French King laid claim to a large part of the Rhine country; in 1681, his general Louvois seized Strasburg and blockaded Luxemburg; another war ensued, but, in 1684, France was given Strasburg by the Treaty of Ratisbon (*Regensburg*); after another war, she was confirmed in the possession of Strasburg by the Treaty of Ryswick in 1697.

The peace of Ryswick (*Ryswijk*) was signed, September 10th, 1697, between France on the one hand and England, Spain and the Netherlands on the other. France abandoned the Stuarts; France and England restored their American conquests and there were other readjustments.

The Partition Treaties were two Treaties made between England and France and the Netherlands, one in 1698 and the other in 1700 (on the death of the Elector of Bavaria). They were intended to settle finally the Spanish Succession. Spain received the Indies, France the Sicilies; Joseph Ferdinand, the Bavarian Elector, by the first received the Netherlands which by the second went to Archduke Charles.

¹⁴The Settlement, previously mentioned, failed; Louis XIV of France, on the death, in 1700, of Charles II, the last of the Hapsburgs in Spain, refused to abide by the Treaty and claimed that his grandson, Philip of Anjou, was entitled to the throne under the will of Charles II. He was opposed by the Grand Alliance, and the war ended by the Treaty of Utrecht, 1713.

¹⁵The Treaty of Vienna, November 18th, 1738, ended the war of the Polish Succession. Stanislaus renounced Poland and received Lorraine, to devolve at his death upon France. This Pragmatic Sanction was a family compact or settlement made by the Emperor Charles VI, published, April 19th, 1713; it provided that the territory of Austria should be indivisible, that in the absence of male heirs it should devolve on female heirs according to primogeniture, and on failure of heirs it should go to the daughters of Joseph I and their descendants. Maria Theresa was the eldest daughter and on the death of her father, 1740, became entitled; Charles Albert, Elector of Bavaria, the next collateral male heir, refused to be bound by the Pragmatic Sanction and the Austrian War of Succession began, France taking part with the Elector although by Article 10 of the Treaty of Vienna, she had agreed to support Maria Theresa. This war came to an end by the Peace of Füssen, 1745.

¹⁷The author follows Lambert's version; Chalmer's Collection of Treaties, London, 1790, Vol. I, pp. 380, 382, has language slightly different. Art. 12 cedes "All Nova Scotia or Acadia with its ancient boundaries as also the city of Port Royal, now called Annapolis Royal, &c., &c." Art. 15 contains the provision: "The subjects of France inhabiting Canada and others shall hereafter give no hindrance or molestation to the five nations or cantons of Indians subject to the dominion of Great Britain nor to the other natives of America who are friends to the same." It was the loose use of the word "Allies" in many documents which gave some colour to the baseless contention of Brant (now recrudescant) that the Iroquois were not the subjects but the allies of Britain. See my judgment in *Sero v. Gault*, (1921), 50 Ontario Law Reports, 727.

¹⁸It will be remembered that when the Lords of Trade were directed in May, 1763, after the Peace, to enquire into violations of the Treaty of Utrecht, they reported that, contrary to the stipulations in that Treaty the French had taken possession of all the lakes in North America, "tho' the circumjacent Territory avowedly belonged to the Six Nations of Indians acknowledged by the French to be your Majesty's subjects in that Treaty"—*Documents relating to the Constitutional History of Canada, 1759-1791*, 2nd Edition, p. 136. There was no delusion then that the Indians were not subjects.

¹⁹The quarrel between New Hampshire and New York concerning the territory now Vermont, is well known—the "New Hampshire Grants" controversy.

²⁰New Brunswick was not separated off from the Peninsula, and Nova Scotia thereby divided until 1784; before that time, New Brunswick was part of the French Province of Acadia and the English Province of Nova Scotia.

²¹See *Chalmers' Treaties*, Vol. I, p. 378. Article 9 ends thus. "All which shall not, however, be begun to be ruined till after that everything is put into his Christian Majesty's hands which is to be given him instead thereof or as an equivalent." The French King gave as a reason for not destroying Dunkirk, that he had not received his equivalent.

²²General Edward Braddock's disaster at Fort Duquesne in 1755, is well known. General William Shirley directed the capture of Louisburg in 1745, and commanded in North America after Braddock's death; John Campbell, fourth Earl of Loudoun, was Commander-in-Chief in America, 1756, and was superseded, 1758; "Abercrombie" was not the celebrated Sir Ralph Abercromby, but, I presume, his younger brother, Robert, who served as a volunteer in America, and with such gallantry that he was made an ensign in 1758, after the battle of Ticonderoga, and in 1759 was made lieutenant. He took part in the Battle of Niagara and the capture of Montreal in 1759; he won distinction in after life in India.

²³The end of 1759 saw Frederick in great straits both for men and money; he bettered his position in 1760 at Liegnitz, and more than held his own at Torgau, his last great battle; Britain was always very loyal to him.

²⁴The reference is to the Peace of Westphalia which ended the Thirty Years' War; the treaties were signed in 1648 at Osnabruck and Münster, the General Treaty of Peace at Münster, October 24th, 1648.

²⁵The Peace of the Pyrenees, November, 1659, was negotiated on an Island of the Bidassoa near the Pyrenees, by Cardinal Mazarin and Don Luis de Haro, on behalf of France and Spain, respectively.

²⁶Tournai in Belgium near to which, at Fontenoy, Marshal Saxe, May 11th, 1745, defeated a joint force of British, Dutch, Hanoverians and Austrians. Tournai was surrendered by the Dutch who agreed that their troops were not to act for a fixed time in any of the places *les plus reculées de la Barrière* (the Barrière being the frontier determined by the Treaty of Antwerp,

November 15th, 1715, by Britain, Austria and the Netherlands. See *Chalmers' Treaties*, Vol. I, pp. 209, sqq.). The Dutch thought that they had agreed not to act in the most distant places of the Barrière; but the French insisted that they were not to act in the places most distant *from* the Barrière—the Dutch thought of the genitive, the French said the ablative.

²⁷The usual form is "oleum," Plautus, *Paenulus*, 1, 2, 119; Cicero, *Ad Familiares*, 7, 1, 3, and *Ad Atticum*, 2, 17, 1. Says the gentle *adolescens*, Agorastocles.—

"primum prima salva sis; Et secunda tu secundo salve in pretio, tertia Salve extra pretium"—no wonder that Adelphasium (or Anterastilis) moans.—"tum pol; ego et oleum et operam perdidit"—no *meretrix* could say less.

"Olea" seems to be "an olive" or "an olive tree," not "midnight oil"; "oleam" is probably, here, a misprint.



The First Attorney- General of Upper Canada—John White (1792-1800)

By

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Of the early life and education of John White the first Attorney-General of Upper Canada, not much is certainly known. Though he had at least a tincture of the classics, he does not seem to have been a University man.¹

He was the only son of John White, of Hicks Hall, in the Parish of St. Sepulchre, in the County of Middlesex and was admitted as a student at the Inner Temple, October 17th, 1777.² A fellow-student at the Inner Temple was the celebrated Samuel Shepherd who married White's sister, Elizabeth, in 1783³ and who always took a great interest in his brother-in-law.

White was a fellow-student of Shepherd under Serjeant Remington (who had married Shepherd's sister, Maria), a special pleader of great eminence; White was called to the Bar at the Inner Temple, 1785; he married and went to Jamaica to practise. There he was unsuccessful and the unwholesome climate seems to have sown the seeds of a sickness from which he suffered from time to time for the rest of his life. He returned from the West Indies and went with his wife and family to Wales, intending to take Holy Orders.

In 1791 it was determined by the Home Government to divide the Province of Quebec into two Provinces—the Provinces of Upper Canada and Lower Canada. This was in law effected by Order-in-Council, August 24th, 1791, after the passing of the Quebec Act⁴. The scheme, however, had been in the air for some time. The Province of Lower Canada had at hand a full staff of judicial and administrative officers, that is, those who had been so employed at Quebec City for the old Province of Quebec. It was necessary, however, to appoint officers for the Province of Upper Canada; and William Osgoode, a Barrister of Lincoln's Inn, was selected as Chief Justice.⁵

John King of the Home Department (to the care of which at that time the Colonies were committed⁶) desired Osgoode to look out for some suitable person as Attorney General. Osgoode had long been acquainted with Shepherd, and Shepherd strongly recommended his brother-in-law, John White, for the office. Osgoode recommended him⁷ to Evan Nepean, a Commissioner of the Privy Seal, a man of great energy and very influential in the Government. Through his influence, White was appointed Attorney-General of Upper Canada⁸.

Col. John Graves Simcoe, who had been appointed Lieutenant Governor of the Province, sailed with his family for Canada in September, 1791, arriving in Quebec October 11th; but Osgoode and White remained until the following spring. Sailing in company with Peter Russell,⁹ afterwards Administrator of

the Government in Upper Canada, and his sister, they met the ice on the edge of the Outer Bank of Newfoundland, May 10th,¹⁰ and arrived at Quebec, June 2nd, 1792.¹¹ They accompanied Simcoe to Montreal, arriving there about a fortnight later;¹² then, June 21st, they left for Kingston, Simcoe to follow them on the morrow;¹³ they arrived at Kingston, Friday, June 29th, and Simcoe two days afterward.¹⁴

The office of Attorney-General did not at this time entitle its holder to be a member of the Executive Council; his duties were to conduct civil and criminal causes and prosecutions for the Crown—"Pleas of the Crown"—to advise the Governor on questions of law, to draw and settle Proclamations, Grants, &c. For these services he was paid fees in addition to his salary; and generally the fees exceeded the official salary. He was moreover allowed to take private retainers when these would not clash with the rights of the Crown. It is only of recent years that the volume of the official work of the Attorney-General has prevented him taking private retainers; and while at the present time the Attorney-General does not prosecute for the Crown, the practice has been abandoned within living memory.

White was an active practitioner and even before the arrival of Simcoe, he had got into harness. Mr. Roe of Detroit handed him two Inquests taken at Niagara; these cases, however, were not to be tried at Kingston, as that was in the Mecklenburg District, but at Niagara in the Nassau District.¹⁵

But an Indian had been killed in the Mecklenburg District and an Inquest had been held on his body; the presentment of the Coroner's Jury being defective, White ordered a new Inquest to be held; this was done and White obtained from the Governor the day after his arrival a warrant for the arrest of the persons accused.

The Courts of the Province at this time were the same as when Upper Canada began her separate Provincial life.

On July 24th, 1788, Lord Dorchester (Sir Guy Carleton) Governor of the whole of the undivided Province of Quebec, issued a Proclamation which (amongst other things) divided the territory which afterward became Upper Canada into four Districts—Luneburg from what is now the eastern limit of the Province of Ontario west to the mouth of the River Gananoque; Mecklenburg from this to the mouth of the River Trent; Nassau from this to the extreme projection of Long Point into Lake Erie; and Hesse all the territory west of Long Point—the boundary lines between the Districts being northerly and southerly.¹⁶

Each of these Districts had three kinds of Courts—

(1) The ordinary form for civil actions called the Court of Common Pleas, which had full civil jurisdiction to any amount;

(2) The Prerogative Court which dealt with Intestacies, &c.;

(3) The Court of Quarter Sessions of the Peace composed of all the Justices of the Peace of the District which had in theory full power to try with a jury all criminal cases, but which in practice sent all capital crimes—and at that time they were very numerous—for trial by the Court of Oyer and Terminer and General Gaol Delivery.

Unlike the Courts just mentioned, this Court was not a permanent Court; at convenient intervals, generally once or twice a year, a Commission of Oyer and Terminer and General Gaol Delivery¹⁷ was issued to a number of persons to hold at a particular place and for a particular District a Court for the trial of criminal cases of all kinds—the Commission of Oyer and Terminer authorizing the trial of all criminal cases in which indictments should be found before the Court itself; that of General Gaol Delivery to try all criminal cases in the District wherever the indictment should be found.

The Court of Oyer and Terminer and General Gaol Delivery for the Mecklenburg District, in which Kingston was the *chef lieu*, had been arranged at Quebec before the Proclamation dividing the province; William Dummer Powell,¹⁸ "First Judge" of the Court of Common Pleas for the District of Hesse, who resided at Detroit, had been selected by General Alured Clarke as the Commissioner to preside and a Commission signed by Clarke issued to him. But when the division into two Provinces became effective, by the Commissions and Instructions given to Dorchester and Simcoe, the latter was the only Executive in Upper Canada except when Dorchester was personally present in that Province.¹⁹

The Canada Act of 1791, 31 Geo. III, c. 31, by section 33 continues in force until repealed or varied, "all laws, statutes and ordinances" in force at the time of division. This was rightly construed as continuing all the permanent Courts (although this interpretation was not wholly unquestioned). The Commission of Oyer and Terminer and General Gaol Delivery was a different matter. Simcoe was advised by Mr. Ogden, a lawyer of Quebec, that to render the proceedings legal he ought to issue a Proclamation authorizing the Courts to act under the Canada Bill. But the difficulty arose that Simcoe was directed by his Instructions to take certain Oaths before his Executive Council before taking the Government upon himself. An Executive Council for Upper Canada had been named by the Instructions, namely, William Osgoode, William Robertson, Alexander Grant and Peter Russell.²⁰ Of these only Alexander Grant was on this Continent, and as by the Common Law at least half the number were required to make a quorum, Simcoe was helpless; he had no power to act at all as Governor; he represented the difficulty to the Home Authorities, but they gave him no relief.²¹

He consulted William Smith, Chief Justice of Quebec (as afterward of Lower Canada), and the Chief Justice gave him the opinion that he would have no trouble with Powell.²²

The arrival of Chief Justice Osgoode and Peter Russell did away with all difficulties about an Executive Council quorum, but before their arrival, it had been made clear by Powell that he would act on his Quebec Commission; however, this arrival of the Executive Councillors made it possible for Simcoe himself to issue Commissions of Oyer and Terminer; and on July 27th, 1792, he issued one to Osgoode who presided over the Court instead of Powell.

The murder of an Indian was not the only criminal case which White had to attend to at once. There were two men confined at Kingston on a charge which was not at all uncommon amongst the immigrants from the revolted Colonies in early Upper Canada. Rice Honeywell and Cromwell Thirby were.

charged before Justus Sherwood, J.P., (father of Levius P. Sherwood, later a Justice of the Court of King's Bench), with "treasonable talk." Honeywell was not a United Empire Loyalist; he had been a soldier in the rebel army, but had come to Upper Canada attracted by the free land. He received a free grant of 100 acres through Justus Sherwood, notwithstanding the objections of the inhabitants; he showed but little gratitude for the King's gift, but boasted of having served the Congress and expressed contempt for the King. The Court of Quarter Sessions of the Eastern District met at Cornwall, took the examination of these two men and committed them to the Fort at Oswegatchie (Ogdensburg) and thence they were sent to Kingston as the Eastern District had no Gaol.²³

One of the Justices, John Munro, tried to go to Quebec about the matter; but was obliged to return to Montreal by the inclemency of the weather; he found on his return to his District that the idea had gone abroad throughout the District that there was no longer any law as the new Province was not now governed from Quebec, and there was much uncertainty and confusion not wholly allayed by the advertisement Munro sent all over the Lunenburg District with a copy of a reassuring letter sent by Simcoe to John Macdonell, a Judge of the Court of Common Pleas of the Lunenburg District.²⁴

White took up these cases and prepared them for trial.

The criminal side did not take up his whole attention; we find him consulted by the plaintiff in an action of Stringer v. Booth, which had been decided in the Mecklenburg Court of Common Pleas in the previous September. He was unable to give the plaintiff any comfort.²⁵

White rented a house for the term of his stay in Kingston and had familiar social intercourse with the officers of the Army as well as the Lieutenant-Governor, his officials and the aristocracy of the small town and vicinity.

On Sunday, July 8th, 1792, the Lieutenant-Governor attended by Osgoode, Russell and James Baby, the Magistrates, &c., went to the "Protestant Church" (Church of England); on Monday, July 9th, Chief Justice Osgoode, William Robertson, James Baby, Alexander Grant and Peter Russell were formally appointed to the Executive Council, and Simcoe took the official oath, administered by the Chief Justice.

The first actual meeting of the Executive Council was held at once and Upper Canada was fairly launched on her separate career. As we have seen, to avoid all possible question a Commission of Oyer and Terminer and General Gaol Delivery was issued July 29th, 1792, to Chief Justice Osgoode for the Mecklenburg District, and he presided at the Court instead of Powell.

The Court of Oyer and Terminer and General Gaol Delivery came on, Thursday, August 23rd, Chief Justice Osgoode presiding. William Robertson and one Fraser, accused of the murder of the Indian, were prosecuted by White, as was William White accused of stealing a sheep from the Commodore. All were acquitted.²⁶

Before this, however, White had made up his mind to be a member of the House of Assembly for the new Province. The Canada Act of 1791 by section 17 provided that the Assembly should be composed of not less than 16 members, and by section 14 that the Governor should issue a Proclamation dividing the

Province into Districts or Counties, &c., for the purpose of representation. Even before such a Proclamation was issued, White had it in mind to represent the County in which Kingston was situated; he consulted Simcoe and Simcoe approved of his becoming a candidate.²⁷

On Monday, July 16th, 1792, a Proclamation was approved by the Executive Council and issued by Simcoe dividing Upper Canada into 19 Counties and 16 electoral divisions. The counties (beginning on the east) were:

1. Glengary (with two ridings)
2. Stormont
3. Dundas
4. Grenvill
5. Leeds
6. Frontenac } these two forming one Electoral Division;
7. Ontario (The St. Lawrence Islands from Amherst Island to Howe Island, &c.)
8. Addington, which formed with Ontario one electoral Division.
9. Lenox
10. Prince Edward } The township of Adolphus in Lenox forming one Electoral Division, with Prince Edward.
11. Hastings
12. Northumberland } These two with all Lenox except the township of Adolphus forming one Electoral Division.
13. Durham
14. York
15. Lincoln } Lincoln was divided into 4 Ridings; the first Riding with Durham and York formed one electoral division; the second and third Ridings each formed one electoral division.
16. Norfolk, which with the fourth Riding of Lincoln formed one electoral division.
17. Suffolk
18. Essex } these two forming one electoral division.
19. Kent, with two members.

There were thus technically only 15 electoral divisions but one of them, Kent, sent two members to the House of Assembly.²⁸

White selected the constituency of Leeds and Frontenac—he calls it, “Kingston County”—obtained the support of Cartwright and Forsyth, the most prominent and influential citizens, and made an active canvas in the town and country. His pretensions were challenged by some of the farming community, and for a time he feared that a local man would be put up by the Township of Elizabeth, in the county of Leeds “very populous and likely to defeat my election”; he “wrote some addresses to be dispersed amongst them,” and whether for that or for some other more potent and less legitimate reason, when the election day, Friday, August 10th, came round, Mr. Grogan was not nominated; no other candidate than White appeared and he was unanimously elected—“after which they dragged me about in a chair to the diversion of the mobile, and my inconvenience”; and he, recognizant of their enthusiasm, “gave 2 barrels of porter and bread and cheese.”

The Court being over, White set sail for Niagara, Tuesday, September 2nd, with Peter Russell and Miss Russell, Alexander Grant, M.L.C., and others of the official set; they arrived at Niagara the following evening. The Governor and others had preceded them, leaving Kingston, July 23rd, and arriving at Niagara, July 26th, on the *Onondaga* (Commodore Beaton).

White's health when in Kingston had been indifferent; he suffered from colds, fever and gout, which repeated doses of ipecacuanha failed to cure, and emetics were not effective.

House accommodation at Niagara was very limited and on the Governor's arrival, Navy Hall, intended for his official residence, was being repaired. Simcoe had with him a number of "Marquees" which had been provided for Captain Cook's expedition, and he ordered three of these to be erected on the hill above Navy Hall for the use of himself and family. The marquees were supplemented by a kitchen, "an arbour of oak boughs," and provided the Governor with a house for the time being. But Prince Edward, afterward Duke of Kent, (father of Queen Victoria) was in Canada at the time and was making a tour of the Upper Country; as he was expected in Niagara about the middle of August, the Governor was in a dilemma where to lodge him, and he decided to give up his marquees to the Prince, and himself occupy Navy Hall, "damp, miserable, unfinished" as it was, and there he went Sunday, August 16th, "in a cold, blowing, dismal night."²⁹

When White arrived at Niagara, Simcoe placed one of the marquees at his disposal and this he occupied for some months. He had not been in Niagara for a week when clients began to come to him; under date Monday, September 17th, he notes that Mr. Springstein, of the Mountain near the Falls, came to him "with a case which, having answered, I received my first fee 2 dollars." The Houses of Legislature for the Province had been called together for September 17th, and difficulty was found in providing accommodation for the Session. Freemason's Hall at the north-west corner of King Street near the River had been erected in 1791 by authority of the Land Board—this had two storeys, the upper used by the Masonic Fraternity as a Lodge Room and the lower for public gatherings. White and D. W. Smith, a member of the House from Kent and afterward Deputy Judge Advocate and Acting Surveyor General, as well as licensed to practise as an Advocate, examined this place and approved it for the Session of the Legislature, and there the Legislature met.³⁰

White took an active part in the proceedings of the Session "where indeed," he says, "there has been unusual ignorance and stupidity."

During the Session, Alexander Campbell, member of the House of Assembly for Dundas, was arrested by the Sheriff of the Nassau District, W. B. Sheehan, on a *capias ad respondendum*; on being released, he consulted White and at the next Session the Sheriff received a rebuke from the House.³¹

Two days before the close of the Session, White moved his effects to the "Canvass House" (See Note³⁰); this he occupied until March, 1793—his health was very uncertain and he was sick with gout and other disorders a fortnight at a time.

But he continued to see clients, attended to the daily routine of his office, drawing deeds, &c.,—for example, we find him advising in cases from Detroit: "John Young from Grand River came with Mr. MacMichael respecting his runaway negro. Rec'd. 5 Dols." A civil action also was entrusted to his care. Samuel Street, a well-known resident of the Niagara District, was in possession of certain land at "The Landing" by the Niagara River. A grant had been made in 1784 by Lieut. Col. A. De Peyster, "Commanding the Upper Forts," by authority of General Haldimand, Governor of the Province of Quebec, to Isaac

Dolsen of certain lands. Dolsen sold the land to Street and McLauchlan, a partnership; the partnership dissolved and the land went to Street after an intermediate sale to Elijah Phelps. On a survey being made by Neil Frey, an assistant surveyor, the "tickets" for the land were given to Street. It turned out, however, that the particular land of most importance was on the "Government Reserve" along the river bank. Lieutenant (afterward General) Robert Pilkington of the Royal Engineers entered upon this land in the early fall of 1792 and built houses thereon; Street sued him in the Court of Common Pleas for the Home District—the Government directed White to defend the action. It was tried, October 30th, 1792, at Niagara, and the defendant was successful—a motion in arrest of judgment failed, and Street lost the land.³² White was also interested in the administration of justice; and with the Chief Justice, William Osgoode, Robert Hamilton (one of the Judges of the Court of Common Pleas for the District of Nassau) and Ralfe Clench, Clerk of the same Court, he settled the practice of that Court which theretofore had been unsatisfactory. He also drafted several Bills for the coming session, amongst them the exceedingly important Militia Bill. The Legislature met again, May 31st, 1793, and White drew the Answer of the House of Assembly to the Speech from the Throne. He was very active during this the Second Session, particularly in supporting the Slave Bill prepared by Chief Justice Osgoode and himself.³³

After the prorogation of the House he defended the action of *Richardson v. Duer*, in the Court of Common Pleas for the Home District, which resulted in a verdict against his client for £50. "Nothing but irregularities, prejudice and confusion in the Court"; and a few days afterward he obtained a new trial; this resulted in a verdict of £20, and the defendant was forced to be content.

In July, Commissions of Oyer and Terminer and General Gaol Delivery were given to Chief Justice Osgoode for the Eastern and Midland Districts; and it became White's duty to attend these Courts. He boarded the ship at Niagara but it did not leave the river until the following day; he arrived at Kingston, August 6th; the Court did not sit until the following day. At that Court he prosecuted David Sutherland for murder (he was found guilty of manslaughter) and George Walker Andrews for burglary ("the burglar acquitted"). This man was charged with breaking into the house of Frederick Henford, a store-keeper, and stealing eight muskrat skins worth forty shillings currency and six raccoon skins worth five shillings currency.³⁴ He was consulted in the case of *Sherwood v. Adams* in the Court of Common Pleas for the Eastern District; and received a fee of "two Half-joes,"³⁵ but did not take any part in the trial.

White then proceeded to the Eastern District, "slept at the Gananoqui, passed a Miserable night," and towards the end of the second day arrived at "Mr. Burke's Tavern" where the Court sat—one man, Joseph Saluce, charged with murder was acquitted and the Court rose. He then returned to Kingston, set sail for the west, arrived in Toronto Harbour where he landed to attend an Indian Council, and four days afterwards arrived at Niagara.

The usual dull round of duties succeeded; he advised on matters of law, public and private; he prosecuted persons charged with murder, burglary and larceny in the Western District. Nothing of moment seems to have occurred in the office of Attorney General during the year 1793.

But on Sunday, May 12th, of this year, "the *Onondago* arrived from Kingston," bringing two persons who were to have a great influence over White's life, and to bring about his premature and violent death—Mr. and Mrs. John Small. Small was an Englishman of a good county family from Cirencester, England, who came out to Upper Canada with a warrant for his appointment as Clerk of the Executive Council (Maj. Littlehales had acted as Clerk *pro tem*). His wife is described as of rather inferior social standing, but she was vivacious and had much charm of manner. It was not long before White became very intimate with both husband and wife; he frequently dined with them and they with him; they even lived for a time with him in his home and this intimacy continued for more than six years.³⁶

In the Session of 1794, White conducted through the House of Assembly the Governor's measure for abolishing the Courts of Common Pleas and instituting one Supreme Court for the whole Province—34 George III, c. 2 (U.C.)—the Court of King's Bench with the jurisdiction in the Province, Civil and Criminal of the Courts of Kings Bench, Common Bench and Exchequer (on the Revenue side). Thus was introduced the system which in substance prevails till the present time.³⁷ Before that Act the Judges in the Civil Courts were (with one exception)³⁸ non-professional; thereafter all Judges appointed to a Supreme Court have been members of the Bar of some British country. In this year, too, he had a good deal of trouble as to his fees; and in the following year he had almost, if not quite, an open quarrel with Simcoe over his emoluments.³⁹ But on the whole, White got along well with the other officials including even the somewhat peppery Powell.⁴⁰

He removed to York with the rest of the official class when in 1797 that place became the capital instead of Newark (Niagara); he built a house for himself on land on the southeast corner of the present Bloor Street and Sherbourne Street, consisting of only four rooms and a kitchen, and costing him £800.⁴¹

His wife and family of two sons and a daughter joined him at York⁴² and lived with him until his death in 1800.

He was shamefully underpaid; his "salary and emoluments were inadequate to supply the demands of life, the real demands of life," so that he was obliged "to dig his own potatoes and cut his own firewood," which he thought incompatible with his station and education; and even then he was obliged to dip into his private resources, and his circumstances were greatly injured.⁴³ White was defeated by Christopher Robinson when he offered himself for the Second Parliament; his urgent advocacy of the Slave Bill of 1793 had rendered him *persona non grata* to many of the people and he could have no such gubernatorial backing as Simcoe gave him in 1792. The Administrator, Peter Russell, and he were not very good friends. How the country stood on the question of introducing slavery may be judged by the fact that in 1798, in the second Session of the New Parliament, a Bill allowing the importation of slaves carried in the House by 8 to 4; it failed in the Upper House, receiving the three months' hoist.

In the First Session of the Second Parliament of Upper Canada, 1797, an Act was passed forming the Law Society of Upper Canada,⁴⁴ and White took an

active part in its organization and management. He was the first member of the Society, the first to be called to the Bar, the first Bencher and the first Treasurer—all in Trinity Term, 37 George III.

He attempted to have the Rules so framed as to have the effect of separating the two branches of the profession as in England, and render it impossible for the same person to be Barrister and Attorney (or Solicitor); the Judges, in view of his objections, declined at first to approve the Rules and referred the matter back to the Society. His death, however, removed the objector and the objection; and the Rules were approved with the result that we have an anomalous system whereby the same person may be Barrister and Solicitor, but the professions are distinct.⁴⁵

In November, 1794, Governor Simcoe appointed a Solicitor-General in the person of Robert Isaac Dey Gray, a young Canadian (the son of Major James Gray), who had also received a Licence to practise law from Simcoe in the same year;⁴⁶ thereafter the Crown prosecutions, which White had so far conducted for the most part alone, were divided between the two Crown Officers—thus still further reducing the emoluments of White.

He petitioned the Executive Council that his accounts should be paid quarterly instead of half yearly, and that certain fees should be paid him direct, and this was concurred in.⁴⁷

He was, however, still shamefully underpaid, and he wrote to the Duke of Portland, Secretary of State, for relief; he also had his brother-in-law, Samuel Shepherd, use his by no means small influence. Portland suggested that he should take the Chief Justiceship of Nova Scotia, vacant by the resignation of (Sir) Thomas Andrew Strange.⁴⁸ He had expected to be made Chief Justice of Upper Canada when Osgoode went to Lower Canada in 1794, but he had been disappointed, as Elmsley was appointed in 1796.⁴⁹ White accepted the offer of the Chief Justiceship at Halifax; but other claims intervened and Sampson Salter Blowers was appointed.⁵⁰

The few remaining years of his life, White continued in the round of his official duties, much underpaid and having constant trouble over his fees. His health was bad at all times and he suffered occasionally from severe sickness confining him to bed for days at a time. Probably his ill-health and *res angusta domi* had much to do with his undeniable irascibility amounting sometimes to actual rudeness and worse.

We find him obliged in 1799 to apply to the Court of King's Bench for protection from Captain William Fitzgerald of the Queen's Rangers who had written him two threatening letters.⁵¹ But worse was to follow.

During the festive Christmas season, White made use of language concerning his former friend, Mrs. Small, wife of Major Small, Clerk of the Executive Council, that must, according to the ethics of the times, lead to the death of either himself or Mrs. Small's natural defender. The language was inexcusable if untrue, more so if true, and White must have known (if he was himself) the inevitable result.⁵²

Small promptly challenged White—a challenge which could not be declined and which must lead to the gravest consequences. White was under no misapprehension as to the seriousness of the situation. The day before that set for the

duel, he made his holograph will, forgiving everyone and saying, "I should like to have lived for the sake of my family, but I hope I am no otherwise afraid to die than a rational being ignorant (of) everything but his own insignificance and the power of the Almighty should be."

The two duellists met in Government Park in a grove behind the Government Buildings on Palace (now Front) Street at the foot of what is now Berkeley Street, Toronto. White fell, shot in the body, the bullet passing between the second and third ribs on the right side, touching the spine and then lodging near the left kidney. In the existing state of science, the wound was almost necessarily fatal. White was carried to his home and there died after thirty-six hours of agony.⁵³

Pursuant to the request contained in his will,⁵⁴ his body was wrapped in a sheet and buried in his garden. In 1871, his bones were disturbed by labourers digging for building sand. They were taken up by the Nestor of the Ontario Bar, Mr. Clarke Gamble, Q.C., and by him laid in Lot No. 90, Block 1, in St. James' Cemetery, bought by him for the purpose, July 29th, 1872. He now lies under the simple inscription:

IN MEMORIAM
JOHN WHITE, ESQ.,
ATTORNEY-GENERAL

of
UPPER CANADA

Died at York

3 January AD 1800

Small was tried at York for murder, January 20th, 1800, before Mr. Justice Allcock and a jury, the foreman being William Jarvis; the verdict was "Not Guilty"; for, as a Chief Justice of Upper Canada said on a trial in a similar case a third of a century later, "Jurors have not been known to convict when all was fair."⁵⁵

The young Law Society desired to purchase the books left by White but suitable arrangements could not be made and they were sold at auction, April 11th, by the executor.⁵⁶

White's wife was Marianne Thornhill, said to have been of "a good Welsh family," pretty and with some fortune; the marriage was a happy one to all appearance.⁵⁷

They had three children Charles Samuel and William Glendower, apparently twins, and Eleanor. The boys were sent at once to England to their aunt, Mrs. Shepherd, Lincoln's Inn Fields, and were placed by their uncle, Samuel Shepherd (he was not knighted until 1814) in a good school. Charles Samuel entered the Navy and earned the approval of Lord Nelson.⁵⁸ William Glendower entered the Bombay Artillery of the East India Company's Service and rose to the rank of Colonel. The daughter went to England with her mother and continued to live with her. She married one Lowen and died without issue. Charles

Samuel also died without issue. William Glendower had one daughter, Louisa, who married the Rev. James Stuart Vaughan; they have a number of living descendants in England.

Mrs. White and each of her children received a considerable grant of land (1,200 acres each) which proved of little advantage to them; land was too abundant in the Province to be of much value,⁹ and she was indebted to Shepherd for her means of subsistence.

NOTES

¹The only John White on the Rolls of Oxford University is "John White, son of John White, of Romney, Hants, Gent.," who, at the age of eighteen, April 1st, 1773, was matriculated at Christ Church, and became a Fellow of New College, and B.C.L., 1781. Foster, *Alumni Oxonienses*, Vol. IV, p. 1539, No. 30, queries his call to the Bar at the Inner Temple, 1785. This John White, however, took Orders, became Prebendary of Salisbury, 1804, and was Rector of Hardwick with Weedon, Bucks, 1807, until his death, July 18th, 1833. Almost certainly this White was not called to the Bar. I find no trace of our John White at Cambridge.

²The identification of our John White cannot be considered quite certain, though it is very probable. White is sometimes said to have been admitted at Gray's Inn in 1780, and it is possible that such is the case—there is no incongruity in his being admitted at Gray's Inn and called at the Inner Temple, but it is very unlikely. There was admitted at Gray's Inn, April 12th, 1780, a "John White, the eldest son of Thomas White of Cork, Gent." I at one time thought that this was our John White, but I now consider that I was wrong. See my *Old Province Tales*, Glasgow, Brook & Co., Toronto, 1920, at p. 14.

³Samuel Shepherd had entered the Inner Temple in 1776, and was called in 1781. Lord Campbell calls him a very sound lawyer and Lord Kenyon said of him, "he has no nonsense in his head"; he refused the Chief Justiceship of both the Common Law Courts from a disinclination to try criminal cases or perhaps from his deafness, or both. He became Solicitor General in 1813, Attorney General in 1817, and died in his 81st year, November, 1840. His wife, Elizabeth, the sister of our John White, is described by her son, Henry John Shepherd, as "the sister of an intimate friend and fellow student, a lady of small fortune, of great sense, of taste, spirit, and accomplishments."—25 *Law Magazine* (1841), p. 290—but Sir Walter Scott, who entertained a high opinion of Shepherd, who had obtained the position of Chief Baron of the Exchequer in Scotland, which Scott himself desired and applied for, after speaking of the patience of Shepherd, adds, "He has occasion for patience, otherwise I should think, for Lady S. is fine and fidgety, and anxious to have everything *point devise*." Scott's *Journal*, II, p. 58 (December 20th, 1825). See also *Dict. Nat. Biog.*, lii, 56. She died in 1833. *Gent. Mag.*, 1833, i, 378. Her granddaughter, Mary Elizabeth Brandreth, widow of Lt.-Col. Henry Rowland Brandreth, R.E., F.R.S., and daughter of Henry John Shepherd, Q.C. (son of Sir Samuel Shepherd), in a privately printed volume, "Some Family and Friendly Recollections of 70 years," speaks of Lady Shepherd, p. 129, thus, "My Grandmother Shepherd was a woman of great good sense, and a strong, honest feeling for others, though most undemonstrative in manner; she was also single and straightforward in purpose, calm in temper, and sparing of words, prompt and quiet in action." *Tot homines, quot sententiae*.

⁴The Order-in-Council, August 14th, 1791, is printed in the Ont. Archives Rep. for 1906, pp. 158, sq.; the Proclamation bringing the Act into effect was issued at Quebec by Sir Alured Clarke, November 18th, 1791, and became effective Monday, December 26th, 1791, the true birthday of our old Province. Ont. Archives Rep. for 1906, pp. 158, 168, 169, 170, 711.

⁵William Osgoode was the son of William Osgood of Queen Street, Grosvenor Square, London; he was admitted as a student at Lincoln's Inn, 1773, and was called there 1779. By what influence, or for what reason he was selected as Chief Justice of the new Province is unknown—the suggestion of Garneau, *History of Canada* (Bell's edition in Eng., 1862), Vol. II, p. 232, that he was a natural son of George III, is wholly unfounded. See my account of Osgoode in 41 *Canadian Law Times* (April and May, 1921), pp. 279, 345, sqq.

⁶A Secretary of State for the Colonies was appointed in 1768 to attend to American affairs; this office was abolished in 1782 by 22 Geo. III, c. 82, and the Colonies were allotted to the Home Secretary; in 1801 they were transferred to the Secretary for War, and in 1854 a Secretary of State for the Colonies was appointed. John King did not become permanent Under Secretary of State for the Home Department till 1792, but he had been previously acting in the Department. Haydn's book of Dignities (New Edition), pp. 221, 222, 228.

⁷Osgoode's letter is still extant—a copy will be found in the Canadian Archives at Ottawa, C.O., 42; Vol. 21, p. 234; it reads thus.
Sir,—

Mr. King having desired me to look out for some suitable person for the Office of Attorney General for the Province of Upper Canada—I made as extensive an enquiry as I decently could without making a direct Application to anyone. Very few persons were named—and of those the most desirable mentioned was a Mr. White who was regularly educated under a Special pleader of Eminence and afterwards called to the bar some time in the year 1785—soon after he went to practice in Jamaica but not succeeding there he returned to this country and now resides with his wife and family in Wales meaning to take Orders.

Mr. White is not personally known to me but was mentioned by Mr. Shepherd a Barrister of considerable practice and great respectability who has married Mr. White's sister.

From a long acquaintance with Mr. Shepherd I place great Confidence in him— He represents Mr White as a person of liberal education and correct Understanding, as well informed in his profession and as a Well affected subject— I took the Freedom to suggest that as Strict Enquiry wd be made into character any unpleasant disclosure might be painful—he said Mr White's character was without reproach.

I stated the salary at three hundred pounds per Annum with a possibility of some small Addition from other tenable Appointments.

If Sir, no person more Acceptable has been mentioned and you will take the trouble to submit this to the Secretary of State he will exercise his Judgment accordingly.

I am with great regard, Sir,

Your most obedient humble Servant,

Wm. Osgoode,

Lincoln's Inn, Aug. 13th, 1791."

To
Evan Nepean Esq.

Endorsed.—"Linc. Inn, 13th August, 1791.

Mr. Osgoode,

Recommending Mr. White to be Attorney General."

C.O. 42, Vol. 21, p. 254.

⁸The Warrant or Mandamus by the Home Office and the Commission or Patent are in the office of the Secretary of State, Ottawa.

⁹Peter Russell was of Irish descent. He early entered the Army in which he remained 46 years, either on active service or on half pay. He was present in two sieges, and in several engagements by sea and land; did garrison duty for several years at Gibraltar and the West Indies, and crossed the Atlantic eight times. He seems to have acquired and retained the respect and friendship of his superior officers in the Service. When Elliott was appointed to the Legation at Washington, he selected Russell, then a Captain on half pay, as his Secretary, but the appointment fell through, and Pitt appointed him Receiver General of Upper Canada as well as Collector of Customs.

He was subsequently a member of the Executive and Legislative Councils, and also received Commissions as a Judge *pro tem*. On Lieut. Governor Simcoe leaving the Province for England, in 1796, on leave of absence, Russell became Administrator of the Government, which position he held until the arrival of General Peter Hunter, August, 1799.

During Russell's whole life in Canada he was applying for land and increase of pay; he did acquire very considerable valuable land, much of which ultimately went to the Baldwin family, and laid the foundation for their wealth.

Russell was a man of mediocre ability, rather timid in his public capacity, but honest—though always on the watch for opportunities for personal aggrandisement.

¹⁰The date is taken from the diary of John White, under date May 10th, 1793—they left England on or before April 10th, 1792. See letter, Dundas to Simcoe, Whitehall, April 10th, 1792, Can. Archives, Q. 278A. (Printed in the "Simcoe Papers," Ont. Hist. Society, I, 129.)

¹¹See the diary of Mrs. Simcoe, by J. Ross Robertson, Toronto, 1911, p. 85.

¹²See the diary of Mrs. Simcoe, by J. Ross Robertson, Toronto, 1911, p. 94.

¹³Letter, Simcoe to Dundas, from Montreal, June 21st, 1792, Can. Arch., Q. 278, pp. 178, 182 (Simcoe "Papers," *op. cit.*, I, 172); White's Diary makes the date Wednesday, June 21st, but this is a clear mistake. June 21st was Thursday, not Wednesday. (See *Note 14, infra*.)

¹⁴White's description in his diary of the trip from Montreal to Kingston is as follows:

"*Journal from Montreal.*

Wednesday, June 21st, 1792. Set off from Montreal for le Chine. From thence at 12 o'clock and came to the 1st Lock at six. From thence to the Cedars where we stopped and slept.

Thursday. The boats not arriving, walked on by myself almost to point Diable. Embarked and turned the point of Diable and passed the Lock at Coteau de Lac. Stop about 3 leagues below point Budet, the men being fatigued. Slept ashore in the open air for the first time of my life. The place a miserable swamp.

Friday. Resumed our journey about 3 this morning and breakfasted at Point Budet. Proceeded at 8 to Point Johnson, where we arrived at 2. An English farmer settled here.

N.B. At Point Budet, the landlord possessed of the Demarcation land, which is near his house. Some thunder and rain. Pushed off with the intention of reaching Mrs. Bruce's, of Williamston—but continuing to rain, and the Chief fatigued, we put into the house of a Highland settler and passed a tolerable night.

Saturday. Took an early breakfast and walked part of the way to Cornwall, where we took a second breakfast at Mrs. Bruce's— Walked to Mr. Barnharts. Again embarked and passed Ca. French's near the Faux Riviere and came to the Molinet where we landed. Went into Mr. Shate's—came on to rain, attended with lightening. Slept there, and on Sunday, after breakfast walked thro' the wood to Moss's whilst the boats passed the long sault. Again embarked and after rowing about 2 miles I relanded and walked on to Long's where I dined on eggs and bacon and stayed till the boats arrived. Slept at the House of a German in Marysboro.

Monday. After an early breakfast, partly walk and partly rowing arrived at Ant. Loux's where we had second breakfast—from thence to ye saw mill belonging to Mr. Munro where I (found) Allen Paterson whom I once met at the late Mrs. Paterson's whose brother-in-law he was. Came in the evg. to Cap. T. Fraser where we were hospitably rec and slept.

Tuesday. After breakfast we rode to Cap. Fraser's brothers to meet the boats above the Coulet. Embarked and continued onward till 2 o'clock when we stopt at a tongue of land belonging to a Frenchman. Where having stayed till four o'clock for dinner we were obliged by a contrary wind to continue all night.

Wednesday. Arose and took boiling water on board and breakfasted there, continuing our course till the men stopped for rest. On landg we found a profusion of strawberries. Dined and continued our way. The men worked unusually well. Came to a small Hut in a little bay; but it was too indifferent to lodge in. So we encamped on a knoll of Rock and raising an indifferent defence agt. the due, we passed the night there. The scenery, when aided by the Canadian's fire and the light of the moon was very picturesque.

Thursday morning arose at 6. boiled our kettle and breakfasted on board. At 12 arrived in the midst of the Cluster of the Thousand Isles. Stopt for a Pipe. Shewed Mr. Chief so fine a bathing place that he could not resist the temptation. Caught several fish. At 10 o'clock came to a pipe, and found an Indian Wigwam. There was an old Squaw with a Grandson and two great Granddaughters who told us that she had passed her hundredth year. I brought too at 2 o'clock (Mem.: In reading "Boote's suit at Law"—it occurred to me that the Indian has a right to a jury—half British and half Indian. But Que. If so, and if so how are they to be sworn?) Whilst at dinner Col. Gordon's Brigade passed by and made a most pleasing scene. Came in the eveng to the point of a rock where the ships in the Lake were built (I suppose during the war) where we pitched our poles indifferently, there not being any hold'g ground. About 11 it came to blow hard and our tent being but an indifferent structure soon came about our ears; we were obliged to take to our batteau; and passed the remainder of the night miserably.

Friday. At 4 got under weigh & at 7 came to an Island where we breakfasted. From thence we continued our way till we arrived at the Cedar Island. There we stopped and shifted our linen, and arrived in Kingston at 3 o'clock. The vessels in Harbour toisted their colors in complmt. and the Commandant & Post Captn received us on our landing. Dined upon Mr. Lethbridge's invitation at the Mess."

The original of this diary is in the possession of Mrs. Egerton, of Toronto, who has stated her intention of publishing it. She has been good enough to allow me to make a copy and to use it. The diary was not kept from day to day but was entered up at convenient times. Many errors are found, most of them trivial; the most serious is the mistake in the days of the week and month which occurs from the beginning of the diary. Wednesday, June 21st, 1792 (which should be Thursday, June 21st), till the middle of November. He notes, "Three days after (November 18th) I was taken exceedingly ill & kept the chamber till Monday the 3rd of December," thereafter the day of the week and the day of the month correspond; and it seems probable that the previous entries were made during his confinement to his chamber, either from memory or from loose notes. At least, that is the way I have to account for the curious mistake.

¹⁰Of Walter Roe I wrote in "The Legal Profession in Upper Canada," Toronto, 1816. as follows:

"Walter Roe, No. 3 on the Law Society's Rolls, not on the King's Bench Rolls, was the son of a resident of London, England, a man of some means. His father died, and, his mother marrying again, Walter became dissatisfied with his home and went to sea. After following the sea for some years, he attracted the attention of his Captain by his intelligence and ability.

When the ship reached Montreal, the Captain persuaded Roe to enter a law office; he did so, and was admitted to practise law in 1789, April 13th, under the provisions of the Ordinance of 1785—I have his commission before me as I write. He must have left Montreal at once, for we find him in active practice in the District of Hesse that same summer. He appeared in the Court of Common Pleas in and for the District of Hesse the first day it sat, July 17th, 1789, and was the only professional man who practised in that Court during the five years of its existence (so far as appears by the extant records); he appeared, indeed, in practically every case of importance.

"Trained in the French-Canadian law and in the practice prescribed by the Quebec Ordinances of 1777, &c. he was at a disadvantage when in 1792, the Legislature of Upper Canada introduced the English law and in 1794 destroyed the Courts of Common Pleas, instituting the Court of King's Bench in their place. His name does not appear as Counsel in the Term Books although several motions are made by Counsel as his agent; once, too, his name occurs as witness.

"He was a considerable landholder in the Western District, his name appearing in many chains of title. It was he, it is said, who delivered to the Americans the keys of the Fort at Detroit on the surrender of that place by the British in 1796 under the terms of 'Jay's Treaty' of 1794. He was made Registrar for the Western District by Governor Simcoe in 1796, the Commission being still extant in the possession of his grandson, Albert E. Roe, Toronto.

"Although a Benchman from 1797, No. 3 on the List, he never attended any meetings of the Law Society.

"It may be noted that it was a son of his, William Roe, who was the Government clerk who saved much of the public money of the Province from the Americans on their capture of York (Toronto) in 1813 by burying it on the farm of John Beverley Robinson, east of the Don Bridge, on the Kingston Road."

Local tradition has it (as I am informed by Mr. C. M. Burton, the well-known historian of Detroit) that Roe, after dining not wisely but too well, fell into a shallow pool of water and was drowned.

¹⁰Ont. Archives Rep. for 1906, pp. 157, 158; Shortt & Doughty, Constl. Docs., p. 651.

It should be remembered that while the treaty between the Mother Country and the United States of 1783, gave the latter all the territory on the right shore of the Great Lakes and connecting rivers, Britain continued to hold Michillimackinac and Detroit with an indefinite amount of the territory given by treaty to the United States (now part of the States of Michigan and Wisconsin) together with other territory further east until 1796, because the Republic had not carried out its bargain in other respects. At length, by "Jay's Treaty" of 1794, the disputes were arranged and in 1796 the territory was given up—so that in fact, Detroit was part of Upper Canada until 1796.

¹¹A copy of an actual Commission appears in my article on "The Ancaster 'Bloody Assize' of 1814," Ont. Hist. Soc'y, Papers and Records, Vol. XX (1923), p. 123, and will be found interesting. It closely follows English precedents.

¹²William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England, and on the Continent. He took part in the siege of Boston on the Loyalist side, but afterward went to England, and studied in the Middle Temple. He came to Canada in 1779, receiving a licence to practise law, and did practise law in Montreal. Being created first Judge of the Court of Common Pleas for the District of Hesse, he went to Detroit in 1789; when the Court of King's Bench in Upper Canada was organized under the Statute of 1794, he was made the Senior Puisné Judge. He became Chief Justice in 1815, and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature, he served as a Commissioner to treat with the U. S. invader when Toronto capitulated in 1813. He was also recommended by Dorchester for a Commission as Legislative Councillor of the new Province of Upper Canada, but was not appointed. The story of the cabal against him in Detroit is one of the most extraordinary in our (or any) history. It is too long to relate here; sufficient to say that he was charged with treason, evidence was brought against him in the way of a forged letter, etc., so that he had to go to England to clear himself. Powell was really the first Judge in our Court of King's Bench; Osgoode never sat in that Court, but left for Lower Canada before it began operations.

¹³See Ont. Archives Rep. for 1906, pp. 161 sqq. Doughty & McArthur's Constl. Docs. 1791-1818, pp. 5 sqq.

¹⁴Doughty & McArthur, pp. 7, 56; see "Secret and Confidential" letter, Simcoe to Dundas, Montreal, December 7th, 1791, Can. Archives, Q. 278, pp. 23, 24. ("Simcoe Papers," Ont. Hist. Society, Vol. I, p. 88, Toronto, 1923.)

¹⁵Letter, Simcoe to Dundas, Quebec, November 19th, 1791. Can. Archives, Q. 278, p. 7; Doughty & McArthur 57. See also Can. Archives, Q. 278, pp. 23, 24. ("Simcoe Papers," *op. cit.*, I, 83.)

²²Letter, Simcoe to Dundas, Quebec, January 5th, 1792, Can. Archives, Q. 278, p. 40. ("Simcoe Papers," *op. cit.*, I, 100.)

²³See letter, James Gray to Simcoe, Cornwall, January 15th, 1792, Can. Archives, Q. 278, pp. 60, sqq.; Letter, James Munro to Hon. Hugh Findley (Quebec) from Matilda, January 14th, 1792, Can. Archives, Q. 278, pp. 68 sqq.; letter, Simcoe to Munro, February 6th, 1792, do. do., pp. 73, 74. ("Simcoe Papers," *op. cit.*, I, 103-4, 107.)

²⁴"Simcoe Papers," *op. cit.*, I, 137.

²⁵John Stringer of Ernesttown sued Joseph Booth of the same place in the Court of Common Pleas. Stringer was entitled to 100 acres by the Royal Instructions to the Governor of the Province of Québec, and he drew Lot No. 40 in "the Seigneurie of No. Two." He received his certificate signed by the Governor and countersigned by the Surveyor General authorizing him to settle and improve the lot, and promising a deed at the expiration of twelve months. He did not remain twelve months but only two or three and made very trivial improvements; he then abandoned it with an avowed intention not to return. Booth then took possession and Stringer sued for possession of the lot, employing James Dawson to act for him. Dawson was not an Attorney at law, but Stringer gave him Power of Attorney. When the Court was opened, Booth "craved Oyer of the said Power of Attorney," i.e., he demanded that Dawson should produce the Power of Attorney for examination. The Court, Richard Cartwright, Jr.; Neil McLean, and Hector McLean (all laymen, be it said) granted the demand and when the document was produced it was found to empower Dawson to sue for Lot 39, not Lot 40, and the Court dismissed the action with costs. This was in March, 1791; Stringer was not satisfied; he gave Dawson a proper Power of Attorney and promptly sued again. The defendant, Booth, admitted being in possession of the land, but denied the plaintiff's title. After several enlargements, the case came on for trial, September 17th, 1791, without a jury. The Court overruled an objection by the defendant against parol evidence of the plaintiff's title and the plaintiff adduced his evidence; the defendant produced a paper, signed by the plaintiff, exchanging with the defendant Lot 40 for two pounds eight shillings and ten pence and Lot 3 in the First Township, and he alleged that he and the plaintiff had arranged with the Deputy Surveyor, Mr. Collins, that the defendant should have the Lot 40. After reserving judgment, the Court decided, September, 1791, that the Surveyor's certificate was only a promise by the Crown and not a grant; consequently the plaintiff had no legal right to the lot, and the Court dismissed the action with costs. 14 Ont. Archives Rep. (1917), pp. 237, 239, 249, 259, 260, 261, 262. It was in this matter that Stringer consulted White, July 6th, 1792; and White must have advised adversely to the claim as nothing more is heard of the action.

²⁶La Rochefoucault Liancourt, who visited Upper Canada in 1795, tells us:

²⁶"Respecting the frequency and punishments of crimes, Mr. White, Attorney General of the Province, informed me, that there is no district, in which one or two persons have not already been tried for murder; that they were all acquitted by the jury, though the evidence was strongly against them; that, from want of prisons, which are not yet built, petty offences, which in England would be punished with imprisonment are here mulcted, but that the fines are seldom paid for want of means of execution; and that the major part of law-suits have for their object the recovery of debts; but sometimes originate also from quarrels and assaults; drunkenness being a very common vice in this country." See my edition of La Rochefoucault Liancourt's Travels in Canada, 1795, in 13 Ont. Archives Rep. (1916) at pp. 40, 154, 176.

²⁷Robertson had made a confession of killing the Indian but had explained his action in a letter; he claimed self-defence, and at the trial his defence succeeded, whether rightly or not we cannot now say. Fraser was indicted and tried with him, and had the same good fortune; it was probably a drunken brawl, all too common in those days, and for long thereafter a reproach to the good name of the Province.

²⁷White's Diary, Thursday, July 11th, 1792.

²⁸Simcoe seems to have taken credit to himself for White's becoming a member of the Assembly. Writing to Dundas, the Secretary, from Navy Hall, November 4th, 1792, he says "In my passage from Montreal to Kingston I understood that the general Spirit of the Country was against the election of half pay officers into the Assembly and that the prejudice ran in favour of them of a lower order who kept one Table, that is dined in common with their Servants. It was by great good fortune that the temporary residence I made at Kingston created sufficient Influence to enable us to bring the Attorney General into the House. . . ." Can. Archives, Q. 279, pt. I, p. 79. "Simcoe Papers," *op. cit.*, I, 249.

²⁹For this Proclamation see Fourth Ont. Archives Rep. (1907), pp. 178-181. Tpreshe ent County of Ontario was then practically destitute of inhabitants, as was all the country from the Trent River to the head of Lake Ontario. The Counties of Glengary, Stormont, Dundas, Grenville, Leeds, Frontenac, and Prince Edward were practically the same as at present. Some of the others, e.g., Northumberland, Durham, &c., went further north, while the boundaries were quite different.

At the same meeting of the Executive Council, July 16th, 1792, the following were made members of the Legislative Council:—Chief Justice Osgoode, James Baby, Richard Duncan, William Robertson, Robert Hamilton, Richard Cartwright, Jr., John Munro, Alexander Grant, and Peter Russell. David Burns was made Clerk of the Crown and Common Pleas; Richard Pollard and Alexander McDonald (Macdonell), Sheriffs of the Province.

²⁹Diary of Mrs. Simcoe, pp. 135, 136. Navy Hall had been occupied by the Naval Commissioners for the Lakes, and even in 1795 La Rochefoucault Liancourt describes it as "a small miserable wooden house." See my Edn., p. 38. It was burned by the U.S. forces (except a small part) in 1813.

³⁰There have been several stories of the place of meeting—"Under an umbrageous tree," "in a marquee tent one remove in the scale of ascending civilization," "in Navy Hall." Chief Justice Powell says, "in canvas houses which had been prepared for and used by Banks and Solander in their voyage of discovery with Captain Cook, 1768-1771," etc. But Duncan Campbell Scott, F.R.S.C., in a paper read at the meeting of the Royal Society of Canada, May 23rd, 1913, proves conclusively, *me judice*, that the Houses sat in Freemasons' Hall. Trans. Roy. Soc. Can., 1913, Sec. II, pp. 175, sqq.

The "Canvas Houses" had certainly not arrived August 17th (see Mrs. Simcoe's Diary, p. 135), and White, under date Tuesday, October 2nd, says "Breakfasted first time in Canvas House"—the Legislature remained in session until October 18th. He took part in the debate on October 2nd on the Bill for laying a Duty upon wine and spirits brought into the Province. Sixth Ont. Archives Rep. (1909), p. 11; White's Diary, p. 22.

³¹On Monday, June 17th, 1793, in the House of Assembly it was "On Motion made and seconded

"Resolved, That the Speaker do inform W. B. Sheehan, Esquire, Sheriff of this District that the House entertain a strong sense of the impropriety of his conduct towards a Member of this House in having served a writ of Capias upon the Said Member contrary to his Privilege, and that the House has only dispensed with the necessity of bringing him to their Bar to be further dealt with from a conviction that want of reflection and not contempt made him guilty of an infringement upon the privileges of the House."

³²White's Diary, Tuesday, March 6th, 1793, gives an account of the runaway Negro case.

Particulars of the action of *Street v. Pilkington*, Street's title, etc., will be found in J. Ross Robertson's *Wolford MSS.*, Book 2, pp. 259, 276, 277, 278, 280, 282, 283.

Street wrote Simcoe, November 10th, 1792, bitterly complaining of the conduct of the case. "No legal advice could I obtain, a regular bred Attorney-at-Law to combat, one Judge on the Bench the only evidence against me, the other interested in the event, and from ignorance in forms of law proceedings subjected myself to a jury incompetent to the weight of the matter referred to them—thus I waded through a trial to a decision which shocks the penetrating spectator and fills the industrious with doubt, whilst the ignorant stand amazed." He asked Simcoe for a new trial, but said he preferred an "accommodation to an appeal." Simcoe replied, November 14th, in a sharp letter of reproof, and the matter dropped. *Wolford MSS.*, Book 2, pp. 234, 237.

It would seem that Peter Russell received a Special Commission as Judge of this Court; and it was he who was the "only evidence against" Street. It will be seen that Street thought White to be an "Attorney at Law" which he was not, but a layman may be excused for not knowing the difference between the two branches of the profession.

A somewhat curious account is given of an episode in this trial by a contemporary writer, who, from the internal evidence of his work, appears to have been an Irish Barrister:

"An advocate from England of some authority, determined to avail himself of this 'apprehensive frame of mind (i.e., the Jury's 'consciences lest they should judge amiss') 'to improve it into means of influence. Thinking it probable, in a particular trial from the 'circumstances that the Jury would bring in a verdict against his client, he insinuated 'that in such a case he would bring a writ of Attaint against them.' The writer adds 'A Writ of Attaint at the close of the 18th Century! Think you . . . that there is a Bench 'in Westminster Hall whose gravity would not have been shaken at this, and the risible 'emotion felt through the extremist ranks of the Bar.' "Canadian Letters . . . C. A. Marchand, Printer to the Antiquarian and Numismatic Society, 40 Jacques Cartier Square, Montreal, 1912," pp. 57, 58.

Probably White thought he could presume on the ignorance of the jury and of the Judge, Peter Russell, who was a layman, to threaten a writ which had been discontinued for nearly two centuries—if so, it is little to his credit.

It may interest the modern lawyer to know White's fee for this important case; here is the bill

Samuel Street	}	Trespass (Title to land) at the Landing	
Vs			
Robert Pilkington			
Instructions.....		£1. 16. 0	
Attending in Court.....		2. 2. 0	
Motion in arrest of judgment.....		1. 1. 0	
		<hr/>	
Total.....		£4. 19. 0 (Sterling, say \$25)	

³³The active part taken by White in procuring the passing of the Act of 1793, abolishing future Slavery in the Province, proved fatal to all ambition he may have had to be a member of any future House of Assembly. In a note to a paper on Chief Justice Osgoode, 41 Can. Law Times (May, 1921), p. 349 or 46, I say of this Bill:

"Osgoode certainly drew or helped to draw the Bill, but Simcoe deserves most of the credit for the measure. It was not universally popular; that it was due to Simcoe's influence is plain, from contemporary private documents. In a letter by Hannah Jarvis, wife of Mr. Secretary Jarvis to her father, the Rev. Samuel Peters, dated at Newark (Niagara), September 25th, 1793, she says 'He (i.e., Simcoe) has by a piece of chicanery freed all the Negroes by which move he has rendered himself unpopular, with those of his suite, particularly the Attorney General. Member for Kingston, who will never come in again as a Representative.' Jarvis-Peters-Hamilton Papers, Can. Archives. And the Attorney General never did 'come in again as a Representative.'"

White, in his diary, says "To the 21 June some opposition in the House, not much." Under date June 25, when the Bill was in Committee of the Whole, he says "Debated the Slave Bill hardly. Met much opposition but little argument."

³⁴White's Diary; Read's Lives of the Judges, p. 20.

³⁵White's Diary, August 6th, 1793. A "half Joe" was a Portuguese coin—the Johannes commonly called "Joe" in the British American Colonies, was a gold coin—the Portuguese *debra de quatro osoudos* of 6400 reis. By Ordinance of the Governor-in-Council at Quebec, September 14th, 1764, it was said to weigh 18 dwt., 6 gr., and was valued at £4.16.0; the first Upper Canada Statute for the regulation of the values of current coin (1796), 36 Geo. III, c. 1 (U.C.) fixed the value at £4.0.0, the weight being 18 dwt. (Captain Marryat, 1835, in "Peter Simple" says a half Joe is worth eight dollars). White's fee was about \$20.00.

The case of Sherwood vs. Adams illustrates well the course of a lawsuit at that time in a Court presided over by a layman. Justus Sherwood, a well-known man in the Midland District, sued Samuel Adams, also well known, for slander, and retained Mr. Thomas Walker, "Lawyer Walker," the only lawyer in the District. The action was brought in the Court of Common Pleas for the Eastern District, September 27th, 1793, at Osnabruck; Walker appeared for the plaintiff, the defendant appeared in person and "Saith that the words set forth in the declaration said to be by him spoken are true and he is able to prove them." Walker files a replication and asks for a jury for the following Tuesday; the defendant says he is not ready for trial as two of his witnesses are out of the Province; Walker says the defendant cannot by law justify the words and that "at any rate he cannot put off the trial of the cause by any such evasion and ill-founded suggestion"; the Court composed of Edward Jessup and John McDonell orders the trial to proceed. Tuesday arrives, and Walker moves that it be not tried till the next term on consent of parties; this is ordered. But the next term the Court was advertised to sit at Osnabruck, on January 31st, 1792; the defendant duly appeared but there were not "judges enough to compose Term Court" and the Court was not held. At the first Court, held December 11th, 1792, the Court decided that as no Court had been held in January, 1792, the defendant was discharged, and the case must begin *de novo*. The plaintiff issued another writ, and had it served by the Sheriff; both parties appear in person, January 14th, 1793; the defendant says he cannot go to trial as his "witnesses are absent and could not be brought to this Term Court"; he asks that the case be put over to the next term; the plaintiff does not object and the case goes over. In the following term, February 25th, the plaintiff appears in person, and the defendant by his attorney, Mr. Antill (not a lawyer), who says that the action is barred by the Statute of Limitations; the plaintiff is ready to try the merits, but says that "the defendant's plea of prescription appears to be a point of law of which the plaintiff is ignorant; he humbly prays the Honourable Court will indulge him with time to procure Counsel." Mr. Antill asks the Court to decide the question of law, and the Court takes time to consider. Next Sittings, February 27th, the Court holds against the defendant even supposing the plaintiff's declaration were defective, "the Court conceive that it ought not to operate to extinguish his suit as the want of proper counsel might readily betray any others into errors of this nature, particularly where there is professional counsel on the one side and not on the other."

Mr. Antill moves that the plaintiff answer *instantly* the other two points in the defendant's plea "unless he wishes for time to obtain the assistance of counsel"; he does and his wish is granted. Then a Commission is ordered to take evidence of witnesses beyond the jurisdiction of the Court.

May 21st, 1793, a replication is filed by the plaintiff answering the "points of the defendant's plea"; May 22, Antill asks for an order that the plaintiff give in his interrogatories within a month in default of which the Commission should issue to examine the defendant's witnesses only; this the Court refuses and very wisely says:

"The Court consider the defendant's motion as inadmissible, and on consideration of the merits of the case determine that whereas it appears to the Court in this cause that the want of equal counsel on the part of the plaintiff at the last term, and the want of the parties' attorneys at this term, has involved questions which tend more to puzzle than enlighten, on this account therefore it is ordered that the points which retard the progress of this suit be argued by the respective attorneys at the next term, when the Court shall then come to a resolution to make a rule in order to remove every difficulty in the way, and it is likewise ordered by the Court that the order for the commission rogatoire in this cause obtained at the last term be suspended for the aforesaid reasons, and that if the attorneys do not attend the Court will, notwithstanding, proceed to put a period to this suit."

And so the case stood when the plaintiff consulted White.

November 6th, 1793, the plaintiff appears; the defendant does not, and the case is adjourned for two days to allow the defendant an opportunity to appear; the 8th comes, but not the defendant, and a "Default" is entered up against him and ordered to be served upon him, the formal entry being as follows:

"The plaintiff comes here into court in person and prays that the suit now at issue between the plaintiff and the defendant may on some day at the next weekly sessions in this term be brought to a final decision, by judgment on the default already found against the defendant, and that the defendant be served with a copy of the default, at the same time acquainting him with the day this Honourable Court shall judge proper to appoint for the trial.

"The Court upon consideration of the contempt the defendant has shown in not attending, and on consideration of the plaintiff's motion and prayer, do determine that Tuesday the twelfth day of this present month, shall be the day on which they will proceed to put a period to this tedious suit. The Court order that a copy of this rule, with a copy of the default entered against the defendant, and a copy of the plaintiff's motion be served on the defendant, without any loss of time."

November 12th, the defendant still makes default, and the Court finds for the plaintiff and directs a jury for the morrow to assess the damages; November 12th, twelve good men and true, that is to say: 1, Malcolm McMartin, Esq, 2, Mr. John Coons, 3, Thomas Fraser, Esq., 4, John Jones, Esq, 5, James Campbell, Esq, 6, Allen Paterson, Esq, 7, Peter Drummond, Esq, 8, Joseph Anderson, Esq, 9, Mr. William Fraser, Jun, 10, Mr Peter Loucks, 11, Mr James Wilson, 12, William Fraser, Esq., assess the damages as five hundred pounds and costs of suit; and the Court directs judgment accordingly. See 14th Rep. Ont. Archives (1917), pp. 387, 389, 390, 398, 399, 406, 407, 408, 414, 420, 421, 425, 427.

It looks as though there was no real defence, but the defendant played a dilatory game throughout, attempting to tire the plaintiff out.

³⁶White's Diary, where it refers to Mr. and Mrs. Small, is not pleasant reading—e.g., Saturday, March 8th, 1794, "Took Mrs. S. home. Drove Mr. S. afterwards to Ch.J. and home. I went after to bring Mrs. S. to dinner ! ! ! ! ! (italics and exclamation marks are in the original); and the last entry, Saturday, April 5th: "Borrowed yesterday and this day Russell's horse—Dined at S's—a little coquetry and came away immediately after tea." An entry under the date Saturday, February 22nd, 1794: "Some remains of the Procellosos domesticos" seems to indicate that already there was jealousy—perhaps desired by the lady.

I have examined many letters of contemporaries, and of those a little later, and I can find nothing indicating actual wrong-doing at that time; probably a silly flirtation was engaged in by the lady and White.

³⁷In 1837, a Court of Chancery was instituted, and in 1849 it was re-organized with full Equity powers; in 1849, a Court of Common Pleas was constituted with the same jurisdiction as the Court of Queen's Bench; in 1881, these Courts were amalgamated into one Supreme Court by the Judicature Act of that year and this with certain changes still subsists.

³⁸William Dummer Powell, the first Puisné Judge appointed to the Court of King's Bench and afterwards Chief Justice of Upper Canada, had been the first (and only) Judge of the Court of Common Pleas of the District of Hesse (the Western District), and lived at Detroit. All the other judges of the Courts of Common Pleas were laymen.

³⁹Powell arranged the matter of fees. It is not worth while going into the old-time dispute. White's insistence on what he conceived to be his rights may be gathered from the following sharp letter from Simcoe to Small, the Clerk of the Executive Council:

"November 11th, 1795

"Sir,

"To my great surprise the Attorney General in a letter has informed me that he has examined the Council Book. I should hope this omission of your duty in permitting any Person but an Executive Councillor, to such a liberty, originated from Error, and I must beg you to take especial care hereafter that such an event does not happen, as in some respect It is a breach of your oath of confidence.

"J.G.S.

"To John Small, Esquire,
Clerk of the Council."

(Wolford Manor Papers, J. Ross Robertson's Collection.)

⁴⁰Powell did not think very highly of White's professional attainments as is evidenced by certain papers in his handwriting still extant of which I have a copy.

⁴¹See letter from White to King. Under Secretary, from York, November, 1798—Can. Archives, Q. 286, 2, pp. 439, sqq. As to the removal to York see my article "How the King's Bench came to Toronto": 40 Can. Law Times (April, 1920), pp. 280, sqq.

⁴²There is no reference in any available manuscript to the precise time at which Mrs. White joined her husband, but in the letter mentioned in note 41 White speaks of "a steadfast pursuit of my duty that a separation of five years from my family (the seat of government not being fixed) could not interrupt. This separation, unavoidable during the unsettled state of the Government . . ." This indicates that the separation continued until White had come to York in 1797.

⁴³See letter referred to in note 41; also White's letter to Simcoe from York, November 15th, 1798, Can. Archives, 286, 2, pp. 462, sqq. In the former letter, he says:

"If I were to employ a man to cut firewood in this inclement climate, he would charge me six shillings and sixpence *per diem*. It is surely unnecessary to comment on this disproportion—it is more than a third of my salary for one article of life, unquestionably a necessity."

In the latter letter he says

"You, Sir, are so well acquainted with the prodigious expense of living in this Province that you will not be surprised when I tell you that I have unavoidably dipt into my private property."

In the former

"In short, Sir, if such an accident were to happen as my death, my family would be dependent on the bounty of mankind, so much have I suffered in my circumstances since I had the honour of my appointment."

White is rather extravagant in his estimate of the cost of procuring firewood. At 6/6 per day it would take some 300 days to eat up one-third of his official salary of £300, and certainly it would not take an axeman 300 days in the year to cut and split the firewood required for White's small dwelling of five rooms. Wood was common and cheap, so with a fairly generous allowance for the price of the wood, he is somewhat extreme in his complaint.

⁴⁴(1797) 37 George III, c. 13 (U.C.). The Record of the proceedings of the House of Assembly for 1797 is lost, and I can find no conclusive reference to the author of this Act. But many circumstances indicate that White had much to do with it. He was, however, not a member of this Parliament.

⁴⁵See my "Legal Profession in Upper Canada in Early Years," Toronto, 1916, pp. 11, 12, 13, 27

⁴⁶Under the provisions of the Act (1794) 34 Geo. III, c. 4 (U.C.), which authorized the Governor to grant licences to not more than sixteen persons to practise as "Advocates and Attornies." Gray also took part in the organization of the Law Society and was its second member, second Barrister, second Bench (1797) and second Treasurer (1798). He was drowned in the *Speedy* disaster in October, 1804.

⁴⁷Can. Archives, Q. 285, p. 165—Council Meeting at Newark, May 9th, 1797. Present. Peter Russell, Administering the Government; Elmsley, C.J.; Shaw and D. W. Smith. White presented a petition showing that he had been to considerable and unavoidable expense in passing nearly 1,500 deeds without receiving any compensation. "The great price of every necessary of life" induced him to ask relief.

⁴⁸Strange, who had been Chief Justice of Nova Scotia since 1791, went to England in 1796, shortly after he resigned, was knighted and appointed Recorder of Fort St. George, India.

⁴⁹In a letter to Simcoe from York, November 15th, 1798, Can. Archives, Q. 286, 2, pp. 462, sqq., White says:

"It is unnecessary to acquaint you that I had reason to expect the Chief Justiceship of the Province. I cannot say that it was actually promised, but my friends were much disappointed when they found it otherwise."

It is well known that Powell was an eager and persistent applicant for the Chief Justiceship; he also was almost, if not quite, promised the position and it is not unlikely that the appointment of an outsider was determined upon to save the Home Authorities from the dilemma.

⁵⁰Blowers was a man deserving of the appointment on every ground.

White, in the letter mentioned in note 49, says:

"Political reasons have made it necessary to give the appointment to Mr. Blowers, the late Attorney General there, to which I have acquiesced, I assure you, without a murmur, as I ever shall where high considerations induce it."

White did not mean "party political" reasons, but reasons of state.

⁵¹In the Trinity Term, 39 Geo. III, 13th July, 1799, the Court of King's Bench, composed of Chief Justice Elmsley and Justices Powell and Allcock, made an order "that William Fitzgerald, Esquire, Captain in His Majesty's Regiment of Queen's Rangers, do show cause on the first day of Michaelmas Term next, why an information should not be filed against him for writing and sending two letters, dated respectively the 12th and 13th of this instant July, signed William Fitzgerald and addressed to John White, Esquire, and it is further ordered that the said William Fitzgerald do immediately enter into a recognizance before a Judge of this Court, with two sufficient sureties, himself in the sum of one thousand pounds, Provincial Currency, and each of the said sureties in five hundred pounds of the same Currency, conditioned to keep the peace towards the said John White, Esquire, and all other His Majesty's subjects for the space of twelve months from the date hereof. And it is further ordered that the Sheriff of the Home District do forthwith serve the said William Fitzgerald with this order."

This was the time-honoured method of preventing a duel. In this instance it seems to have been effectual, as on the first day of Michaelmas Term, 4th November, 1799, the Solicitor-General moved for and obtained a discharge of the Rule.

⁵²The occasion of the shameful language is not known. The language is given in a letter from William Jarvis, Secretary of Upper Canada to his father-in-law the Revd. Samuel Peters from York, January 18th, 1800—Can. Archives, Jarvis-Peters-Hamilton Papers. It is of the most offensive character and no greater insult can be imagined. Jarvis adds, "Thus White is dead and Small and his wife damned."

⁵³See letter referred to in note 52.

⁵⁴The will, still of record at Osgoode Hall, Toronto, is worth producing in full; it may be found printed elsewhere in this same volume, in the collection of wills of public men of the same period, and accordingly is not duplicated here.

John White was the grantee of some 1,400 acres of land in Upper Canada. Russell did not sell the land or pay White's debts, and in 1837 an Act was obtained, 7 Will. IV, c. 37 (U.C.), vesting the lands devised in Mr. (afterwards Chief Justice) William Henry Draper and Mr. Clarke Gamble as trustees to sell the lands, pay the debts of John White and pay the net balance to those entitled.

Peter Russell, named as executor, was Receiver-General and a member of the Executive Council; he had been Administrator of the Government after Simcoe went to England in 1796 until Hunter's arrival in 1799. Miss Elizabeth Russell was his sister and legatee. Charles and William were White's sons, Mrs. Shepherd his sister and Forsyth & Co., prominent Montreal merchants, his agents. Of Mrs. Susanne Page I can find no trace in contemporary papers; it is noticeable that he does not name his wife or daughter. "Darwin's Botanic Garden" was written by Dr. Erasmus Darwin, grandfather of Charles Darwin of the "Darwinian Theory"; the "Botanic Garden" contained both the extraordinary "Loves of the Plants" and "Economy of Vegetation."

⁵⁵Chief Justice John Beverley Robinson on the trial of John Wilson (afterwards Mr. Justice Wilson of the Court of Common Pleas) at Brockville, August, 1833, on a charge of murder for killing his fellow student, Robert Lyon, in a duel in June, 1833. See my article "The Duel in Early Upper Canada," 35 Can. Law Times, (September, 1915), pp. 726, sqq.

⁵⁶See my "Legal Profession, &c." pp. 83, 97, 98.

⁵⁷Mrs. White in a letter to Lord Hobart, Secretary of State, in 1802(?) Can. Archives. Q. 293, pp. 271, sqq., says, "I am a sister of the late Mr. Thornhill, of Berkeley Square, with whom I believe your Lordship was a little acquainted," and further, "My own paternal fortune (was) sacrificed after the expenditure of Mr. White's in sustaining the immense expenses attendant on a situation which in its infant establishment had permitted no reimbursement or repayment . . ."

In the volume of Recollections referred to in note 3, Mrs. Brandreth says, p. 132, that Mrs. White was pretty and the marriage seemed happy. She is wholly unfair in her statement—"Arrived in Canada she behaved imprudently in Colonial society and was lightly spoken of. It was thought necessary by Mr. White's friends that he should call out the offending person, who, when they met, shot him at once through the heart." This is an absurd travesty of the facts.

⁵⁸Lord Nelson, writing to Shepherd from the *Victory*, February 14th, 1804, in a letter of which the original is preserved by Shepherd's granddaughter, says.—

"*Victory*, Feby. 14th, 1804.

My Dear Sir,—

Your favour of Novr. 15th came to me in Haslewoods packet two days ago. The *Moniteur* first announced to me that Justice had triumphed over power for in no other point of view shall I ever look upon the whole of that business, and from the friendly part you took in my case, I am sure you would not have allowed me to go on if the Justness of my cause had not been clear to your mind, as a lawyer I thank you for all the attention you have ever paid to my cause, and as a friend for all the interest which you took in it.

Your relation, Mr. White, is very well and Capn. Donneley gives him a very high character, with again thanking you for all your goodness believe me Dear Sir your much obliged friend and servant

(signed) Nelson & Bronte.

Mr. Serjeant Shepherd."

⁵⁹David William Smith, Acting Surveyor-General of Upper Canada, writing to Mrs. White from Belmont, 1803(?), says "Lands are estimated low in Upper Canada—lands not taken up are bought for 3d, 4d, 5d, and 6d per acre," Can. Archives, Q. 296, p. 338. See do., do., 339, where he offers his services and "Mrs. Smith offers her Compts to you and Miss White." Mrs. White and her daughter were then living at No. 13 Maddox Street, Hanover Square, and were in "the most serious state of distress." do., do., p. 336.

There are many documents referring to White and his family in the Canadian Archives—if anyone desires to follow the matter further the following may be consulted: Q. 278, p. 282; Q. 279, I, p. 79; Q. 285, p. 165; Q. 286, 2, p. 439; 462, 541, 544; Q. 287, I, p. 102, 106; Q. 287, 2, 466; Q. 288, p. 245; Q. 293, p. 271, 275; Q. 295, p. 3, 346; Q. 296, p. 282, 336, 338, 339; Q. 298, 2, p. 95; Q. 299, p. 209; G. 54, I, p. 79; C.O. 42, vol. 22—Jarvis-Peters-Hamilton papers.

There are also some (but unimportant) references in the Powell papers. I owe the information as to the descendants of William Glendower White to John Norman Sully, Esq., of Bigstone, Chepstowe, England, whose wife is his great granddaughter. William Glendower married Myrtle Antoinette, widow of Capt. Robert Mackintosh, of the Bombay Artillery.



A Cause Célèbre a Century Ago

By

THE HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., &c.

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A CAUSE CÉLÈBRE A CENTURY AGO

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., &c.

In my student days, discussing with my preceptor, the late Allan Ranney Dougall, K.C., of Belleville, the question of interference of the Legislature with the Courts, he informed me that in his boyhood, the Provincial Parliament and some parts of the country were convulsed over a law suit and the attempt of the Legislature to interfere in it.

The recent acquisition of a file of the *Kingston Chronicle*, from July 1st, 1825, to July 1st, 1826, kindly given to me by my friend, R. L. Segsworth, Esquire, has enabled me to find the particulars of this case; and, as it was at the time one of importance, I propose to give the circumstances of it.

Matthew Leech was an old army officer who had fought for the King for many years and had received eleven wounds in His service. He had, moreover, some eleven children, and with them was living at the Town of Brockville. He owed some money to Archibald Richmond of Kingston, a man of means and standing, who had been shareholder and vice-president of the Kingston Bank.

Leech not having paid his debt, Richmond served him with process in the King's Bench, but the debtor paid no attention to it. He later said that he thought there would be some proceeding in addition to the mere service of the Summons before judgment could be obtained against him; but he was wrong in that if he actually did think so, and Richmond entered up judgment against him in default of appearance; this, of course, was perfectly regular and in accordance with the practice of the Court.

Leech still omitted to pay and Richmond took the only course that was open to him at that time under the practice of the Court and imprisoned him on a *Sci. Fa.*, in the common jail of the Johnstown District. It was too late then to enter an appearance, but Leech does not seem to have taken the ordinary means to set aside the judgment immediately. On the contrary, he enlisted the sympathy of some members of the Legislature.

On Monday, December 29th, 1823, Mr. William Morris, who was the representative in the House of Assembly for Carleton, seconded by Mr. Jonas Jones, representative for Grenville, moved for leave to bring in Leech's petition, and, leave being granted, the petition was brought up; it was read on December 31st, but it was not proceeded with for reasons which appear in the debate which took place on a later occasion. It appears that the parties agreed to have the matter submitted to arbitration and this led to the abandonment of the petition.

The parties, however, were unable to come to an agreement; Richmond was quite willing to go into arbitration if Leech would give security to abide by

it, but he was not willing to let Leech out of jail, which was his only security unless he gave some kind of security that the result of an arbitration would be carried into effect.

Richmond offered to submit the matter to the Member for Lanark; he offered to leave it to Messrs. Markland and Macauley, prominent men of Kingston, but Leech refused to accept them as they lived at Kingston; and then Richmond offered to leave it to the arbitration of any person residing at Brockville, Leech's own town, providing he gave security of course. Leech refused to accept this, contending that the sum for which he had been imprisoned was paid. Consequently as the parties could not agree, Leech remained in jail at Brockville and did not make any attempt at paying.

Next year, January 17th, 1825, Mr. David Jones, of Leeds, seconded by Mr. Marshall Spring Bidwell, of Lenox and Addington, obtained leave to bring in a petition from Leech, still a prisoner in the jail at Brockville, of the Johnstown District, and the petition was brought up accordingly. On January 19th, the petition, on motion of Mr. Jonas Jones, of Grenville, seconded by Mr. Hamilton Walker, of Grenville, was referred to a Select Committee composed of Messrs. Bidwell, Morris, Coleman and Cameron of the constituencies of Lenox and Addington, Lanark, Hastings and Glengary, respectively, who had leave to report thereon by Bill or otherwise.

The session was an exceedingly busy one, but on March 30th, the Committee reported. The Official Report is as follows:—

"Mr. D. Jones, from the committee to whom was referred the petition of Matthew Leech, Esquire, informed the house that the committee had agreed to a report which he was directed to submit for its adoption."

The report was ordered to be received, and it was read as follows:

The Select Committee to whom was referred the Petition of Matthew Leech, having examined the same, and duly considered the matters therein set forth, beg leave to report: That it appears, upon an investigation of the proceedings in the cause alluded to by the Petitioner upon a judgment in which he is confined in execution, as appears by his Petition, that the same were not, in many respects, conformable to the practice of the court in which such cause was instituted. The omission, on the part of the plaintiff, to observe such practice in the management of that suit, may have enabled him to obtain final judgment in it by surprise upon the defendants, inasmuch as they were not apprized of those proceedings in the cause which, in conformity with the practice of the Court, should have necessarily taken place to enable him to obtain the same, a notice of which, such practice requires to be given a defendant in any suit. To this circumstance may probably be ascribed the inattention of the Petitioner to the suit in question, and his negligence in availing himself of a defence to the action, which, he seems to consider a just and legal one; and sufficient to do away with the Plaintiff's right of action against him. To whatever cause, however, his want of attention, in this respect, be imputable, the Petitioner may as he complains, have sustained an injustice by the irregularity of the proceedings; and as it would therefore conduce to the end of justice, to have an opportunity afforded the Petitioner of contesting, by means of a regular trial, the plaintiff's right of action against him. The committee are of

opinion that relief should be extended to him, and some measure devised to enable him to attain it; considerable time having elapsed since the passing of the judgment, referred to in this Report, the Court from whence the proceedings in the suit emanated, may not, consistently with its practice, at this time interpose its authority to grant the Petitioner relief, which circumstance, in the opinion of the Committee, renders his application to this House justifiable, and his case a subject worthy of its consideration.

The committee do not feel themselves warranted in pointing out any precise mode of extending relief to the petitioner, as under the peculiar circumstances of his application for it, they consider the expediency and manner of granting it, would more properly become the consideration of this house.

ALL OF WHICH IS RESPECTFULLY, submitted

David Jones,
Chairman.

This was directed to be referred to a Committee of the Whole.

On April 5th, 1825, the House went into Committee on the report of this special committee. The Chairman, Mr. James Gordon, of Kent, reported that the committee had agreed to certain resolutions which he was directed to submit for the adoption of the House and thereupon took place an exceedingly animated debate. From the report of the *Kingston Chronicle* it appears that Jones, Matthews of Middlesex, and Dr. Rolph, took a very strong stand in favour of Leech. While against the resolutions the Attorney General, John Beverley Robinson, Mr. James Atkinson of Frontenac, and Mr. Richard Beardsley of Halton, were equally strong in argument against the bill and in favour of Richmond. From a perusal of the debate it is obvious that those who were opposed to the bill were strongly impressed with the merits of Richmond's case. They pointed out he had been willing to do anything that was right, he was as honest, as honourable and as humane a man as any in the Province. He had offered to arbitrate on proper terms, or to take so much a year out of Leech's half pay till the debt was paid. Those in favour of the bill pressed the injustice of having a man in jail without having his case tried. They pointed out that the Rules of Court did not permit Leech now to apply to set aside the judgment because he had allowed the time to go past, and said that all they wished was to have Leech obtain an opportunity to show that he ought not to pay the alleged debt.

Those in favour of the relief, however, when a vote was called, proved to be 21 in number, whereas there were only 7 against the Bill. Thereupon the two resolutions were passed as follows:

"That as the proceedings in the cause of Archibald Richmond against William Russell and Matthew Leech, instituted in His Majesty's Court of King's Bench upon the judgment in which the said Matthew Leech, as he states in his petition, is confined in execution, appear to have been irregular and not conformable to the supposed practice of such Court, the said judgment may have been obtained by surprise upon the said Matthew Leech, and an injustice thereby done him; and as the said Matthew Leech alleges

that he has a just and legal defence to the said Plaintiff's right of action against him, it may conduce to the ends of justice to have an opportunity afforded him of contesting the same, by means of a regular trial, it is therefore expedient and proper to have some measure adopted for his relief."

"That it is expedient and proper in accordance with the foregoing resolution, by an Act of the Legislature, to render it lawful for His Majesty's Court of King's Bench to set aside so much of the proceedings in the said cause as may be necessary in order to let in the said Matthew Leech to try the merits of the action."

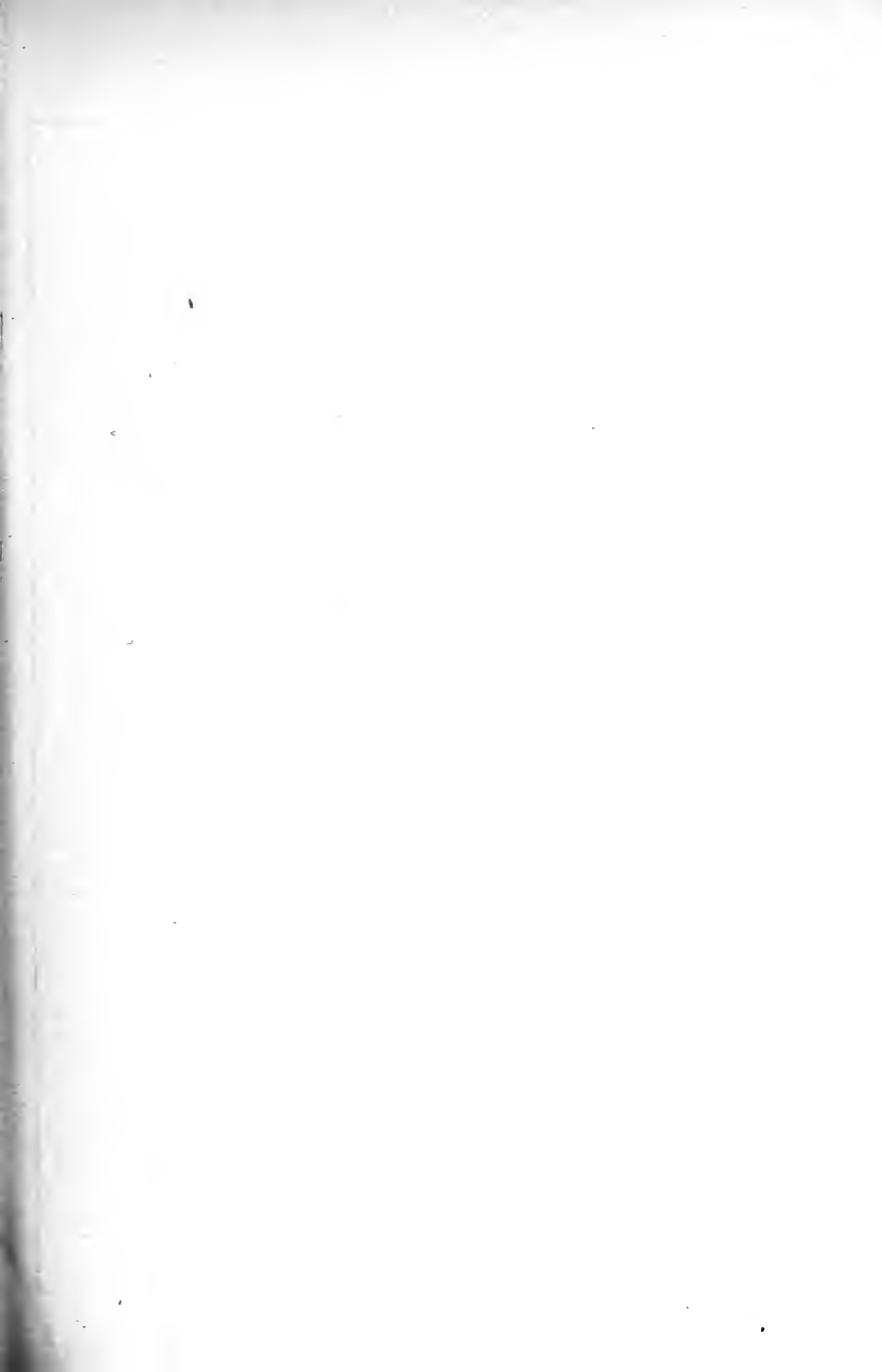
Thereupon Messrs. David Jones and Richard Beardsley were appointed a committee to draft a bill pursuant to the resolutions just mentioned. The bill was brought in by this committee the next day, April 6th, and read the first and second time, then referred to the Committee of the Whole.

The House, however, was dissolved on April 13th, rather prematurely indeed, by reason of the dispute between Sir Peregrine Maitland and his House, so that nothing was done during this session.

The matter however was not dead. In the session of 1825-6, on December 19th, 1825, Mr. David Jones, seconded by William Morris, obtained leave to bring up the petition of Matthew Leech, and it was brought up on December 21st, and it was referred to a Select Committee composed of Messrs. James Gordon, John Rolph, Richard Beardsley and Hugh C. Thomson, to report thereon by Bill or otherwise.

The Committee agreed to report by Bill, a draft of which was submitted to the House on January 16th, 1826, and read for the first time. On January 18th, it was read the second time and the House went into Committee on the Bill. In the Committee, Mr. Beardsley was in the Chair and the Bill was reported without amendment. On the question of receiving the report the Bill was carried by a vote of 22 to 6, those opposed to the Bill being Messrs. James Atkinson, Zaccheus Burnham, Jonas Jones, James Lyons, Donald McDonell and Phillip Van Koughnet. The Bill was thereupon directed to be engrossed and read the third time, which was done January 20th. The Bill being signed, Messrs. David Jones and Hugh C. Thomson were ordered by the Speaker to carry it up to the Legislative Council and to request their concurrence therein.

The Legislative Council made short work of it. Receiving the Bill on January 20th, it was read upon that day and directed to be read the following Monday. On Monday, January 23rd, it was read the second time. The House resolved itself into Committee of the Whole to take the same into consideration. In Committee, the matter was passed upon with great speed and the Chairman, Mr. Clark, reported to the House that the Committee had made some progress in the Bill and requested leave to sit again that day three months. This report was accepted and leave given accordingly. Of course this was the regular way of snuffing out the Bill. Those who were present were Chief Justice William Campbell, the Speaker, and Messrs. Baby, McGill, Clark, Crookshank, the Rev. Dr. Strachan, Wells, Cameron, Dunn, Ridout and Allan. The Bill was never heard of again, and that attempt on the part of the Legislature to interfere with the regular proceedings and process of the Court failed, as most such attempts have failed.





The Law Society of Upper Canada in 1822

By

THE HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., &c.
Honorary President, Ontario Bar Association

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The end of the
world is near
1854

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The Provincial Act of 1822, 2 George IV, Cap. v, (U.C.), which made into a "body corporate and politic in deed and in law," the "treasurer and benchers of the law society" "by the name of the law society of Upper Canada," did not destroy the "Law Society of Upper Canada" which had existed from 1797.¹ The Act of 1797, 37 George III, Cap. 13, (U.C.), authorized the persons admitted to practise and practising "in the law," to form themselves into a society to be called the "Law Society of Upper Canada" for the double purpose of "establishing of order among themselves" and of "securing to the province and the profession a learned and honourable body to assist their fellow subjects as occasion may require and to support and maintain the constitution of the Province." The Act authorized the appointment by the Society of "the six senior members or more of the present practitioners and the six senior members or more for the time being in all times to come (the Attorney General and Solicitor General . . . to be two) as governors or benchers . . .", and also the appointment of "a librarian and a treasurer."²

There were nineteen persons entitled to practise, of whom four were not actually practising.³ Of the other fifteen, ten⁴ met at the time and place fixed by section 3 of the Act, "at the town of Newark in the County of Lincoln on the seventeenth day of July next ensuing the passing of this Act"—the Act, having been passed July 3rd, 1797. The object of the meeting—section 3—was "the framing and adopting of rules and regulations as may be necessary for the immediate establishment of the said society and its future welfare." The rules were to be entered in a book, and to be valid and binding upon all the members upon receiving the approbation of the Judges of the Province as "Visitors of the . . . society".

The meeting Called the fifteen active practitioners to the Bar and passed three Rules. The first was that the two Crown officers and the four senior Barristers should be the Benchers,⁵ and "that the Benchers according to Seniority take upon themselves the Treasurership of the said Society annually." The second provided for the payment of five pounds annually by each Member,⁶ the third, that every Student should pay on admission to the Society £10 and on Call, £20, in addition to the annual fee of £5.⁷

The second meeting of the Society was held at York (Toronto) in Trinity Term, 39 George III, July 13th, 1799, when the first Student was admitted and also Called to the Bar;⁸ and it was determined to call a meeting of the Society for November 4th, to "take into consideration the state of the . . . Society and make further rules and regulations for its future welfare".⁹

Only five members turned up and the meeting was adjourned until the 7th when seven members appeared, and an adjournment was had until the 9th. At this meeting the same seven attended,¹⁰ and they transacted most important business.

The first Rule passed at this meeting made all the fifteen members by name, Benchers of the Society; the second was more important and indeed revolutionary (in form at least). It made the Benchers for the time being the Governors of the Society, five to be a quorum, and gave them power to make Rules from time to time. This Rule purporting to take from the body of the Society the powers given by Statute was of more than doubtful legality; but it was not actively questioned until after it had been in effect recognized by the Legislature in 1822.¹¹

Thereafter the meetings while they were for some years called meetings of the Society were, in fact, meetings of the Benchers and some were so called. "Convocation of the Benchers of the Law Society of Upper Canada" appears for the first time on the first Tuesday of Trinity Term, 1 George IV, 1820; and that terminology has since been consistently followed; it seems to have owed its origin to John Beverley Robinson.

Meetings were held at intervals except during the war period, 1812-1815. Calls were made to the Bar, students admitted, and new Benchers appointed from time to time. The meetings were held in the office of the Attorney General during the incumbency of Thomas Scott (at least from 1803 on), William Firth, 1807-1811 (except one, February 22nd, 1808, held in the office of the Clerk of the Crown); D'Arcy Boulton, 1814-1818 (except two in 1817 held in the Court House) and John Beverley Robinson, 1818-1822, so long as he was Treasurer, 1818-1819; when Henry John Boulton, the Solicitor General, became Treasurer, the meetings (1820) were held in his office (except one meeting in Michaelmas Term, 1820, which was held in the Court House). From 1820 till after the Act of 1822, the meetings were held in the office of the Treasurer for the time being.¹²

No change was made in the Rule for the selection of the Treasurer until 1819. The Rule of July 17th, 1797, "that the Benchers according to seniority take upon themselves the Treasurership of the . . . Society annually" was never strictly followed. We find White, Treasurer for 1797; Gray for 1798, 1799 and 1800; Macdonell for 1801 to 1804; Scott for 1805; D'Arcy Boulton for 1806 to 1810; William Warren Baldwin for 1811 to 1814; D'Arcy Boulton again, 1815 to 1817; John Beverley Robinson for 1818 and until the Michaelmas Term, 1819. In Trinity Term, 59 George III, July 8th, 1819, a rule was passed "that the Treasurer of the Society be chosen annually in Michaelmas Term by the majority of the votes of the Benchers then present."¹³ This Rule was approved by the Judges, July 16th, and at the Michaelmas meeting, Saturday, November 6th, 1819, Henry John Boulton, the Solicitor General, was unanimously elected Treasurer. Then followed Dr. Baldwin, 1820; Robinson, 1821; Boulton, 1822 and 1823, and Dr. Baldwin, 1824, to 1828. The treasurership was not a very enviable position during this period. The treasurer was a treasurer in fact; he kept the books and looked after the finances of the Society.¹⁴ The state of the Law Society in 1822, before the Act, was the following:

1. The Society was composed of all persons who had been admitted as members, i.e., Students at law and Barristers.

2. All the affairs of the Society were transacted by the Benchers.

3. The Benchers were a self-perpetuating body. The Benchers for the time being, from time to time on their own motion, appointed other Benchers from among the Barristers, members of the Society; there was no limit as to members except that there must be six. The Attorney General and Solicitor General were, by Statute, two of the Benchers.

4. A Treasurer was chosen each Michaelmas Term (November) by the Benchers present. The custom had not yet arisen to reelect the Treasurer as of course.

5. The Society had no fixed place of meeting; it had no building; it had bought a piece of land on the south side of King Street opposite St. James' Church, and was contemplating the expenditure of £500 in the erection of a building for its use to be called "Osgoode Hall," and a Committee had been appointed, 1820, to procure plans and estimates but nothing had been done in the matter. It was the practical necessity of holding land which caused the Benchers to apply for incorporation.

The Bill was introduced in the House of Assembly by Attorney General Robinson, seconded by Archibald McLean, of Stormont (afterward Chief Justice of Upper Canada) December 1st, 1821; it passed Committee of the Whole and on a division of 20 to 9, received its second reading, December 3rd; an amendment looking to limiting the amount to be charged Students for admission and Call was voted down, 22 to 9, December 4; and the Bill passed the House, 19 to 7, the same day. The Legislative Council passed it without amendment; and it was assented to, January 17th, 1822.¹⁵

The Act (1822), 2 George IV, c. 5, (U.C.), made "the treasurer and benchers of the law society for the time being and their successors to be nominated and appointed according to the rules and by-laws of the said society . . . one body corporate and politic in deed and in law by the name of the law society of Upper Canada" and *inter alia* with power to receive and hold land without any license of Mortmain; the powers to be "in trust and for the benefit of the said society . . . for the purposes of the said society and for no other purposes whatsoever." The only parts of the Statute of 1797 which were repealed were section 6 and part of section 5. Section 5 had authorized the Judges of the Court of King's Bench to admit to practise those admitted to practise at the bar of England, Scotland or Ireland or any British North American Colony; the Act of 1822 took away this power from the Court and vested it in the Law Society. Section 6 of the Act of 1797 had allowed one regularly articulated and on the books of the Society for three years to be "an Attorney or solicitor"; this was repealed and a provision made for five years' service under Articles, and the necessity for entry on the books of the Society was done away with. Thereafter for thirty-five years the Law Society had nothing to do with the Attorney or Solicitor as such.¹⁶

Whether the omission to repeal the Act of 1797 in other respects was intentional cannot be said with certainty; bearing in mind the ability of the promoters of the Act of 1822, it might be thought that we should have little doubt; but subsequent events rather indicate the reverse.

Convocation continued to carry on its proceedings as before without any open or observable change. But it was not long before the effect of the Act

came in question. The Benchers framed Rules and submitted them to the Judges for their approbation under section 3 of the Act of 1797. The Judges pointed out that there was a new body, a body corporate, composed of the Treasurer and Benchers, over which the Act of 1822 gave them no control, no supervision or visitorship, and that as the powers of the Corporation were to be for the "Society," the "Society" must be something different from the Corporation, and it could only be the "Law Society of Upper Canada" previously existing. They considered, therefore, that there were now two bodies by the name of the "Law Society of Upper Canada," one the new Corporation, the other the Society existing from 1797. With Rules, &c., affecting the Corporation, the Judges held that they had nothing to do and they declined either to assent to or dissent from them; but they readily exercised their judgment on Rules affecting the profession at large.

There was nothing that can fairly be called friction; but the situation was not wholly satisfactory.

At length, in Trinity Term, 11 George IV, July 3rd, 1830, Convocation appointed a Committee composed of the Treasurer, George Ridout, Dr. William Warren Baldwin, William Henry Draper (afterward Chief Justice), Robert Baldwin, James E. Small and the Attorney General, Henry John Boulton, "to take into consideration the existing By-laws and the alterations that it might be expedient to make in them and . . . to prepare a revised collection of such By-Laws, including such alterations, and to submit the same to the Society on the first day of Michaelmas Term next."

On this Committee, Robert Baldwin was Chairman; he is known to have taken a very active if not the chief part. The result of its labours were the "Rules of Trinity Term, 1st and 2nd of William IV," in 13 chapters, passed July 2nd; these were Rules affecting the profession at large and were approved by the Judges, November 19, 1831.

In the report to Convocation presented by Robert Baldwin, July 1st, 1831, the history of the Society was gone into in some detail. It was pointed out that from 1800 the business of the Society had been conducted by the Benchers alone without reference to or interference from the profession at large and that the Act of 1822 seemed to recognize the validity of that practice. Then it was said that by the Act of 1822, "a distinction is drawn between 'The Society' and the 'Treasurer and Benchers' who alone constitute the Convocation of the Society; the 'Treasurer and Benchers' are incorporated but the corporate privileges are to be exercised 'to and for the use of the said Society,' " interpreted by the Committee (as by the Judges) as the "whole body of the Society consisting of all Barristers and Students at Law standing as such on the Books of the institution." The conclusion was that the original Law Society of Upper Canada continued to exist and that a corporation of the same name had been created by the Act. A recommendation was made for the passing of Resolutions bearing upon this matter and the Resolutions prepared by the Committee were passed the same day. They are fifteen in all and are known as "Resolutions of Convocation, Trinity Term, 1st and 2nd of William IV." They set out: 1. the establishment of the Society by the Act of 1797; 2, "that under that Act all persons duly entered of the Society and admitted on its books whether as Students or

Barristers at Law became by such entry and admission to all intents and purposes whatsoever, Members of the Society"; 3, the power of making Rules with the approbation of the Judges; 4, the second Rule of November 9th, 1799; 5, "that by that Rule the whole power of making Rules and Regulations for the Government of the Society was duly transferred to and vested in the Convocation of Benchers"; 6, recognition of this Rule by the Act of 1822; 7, this Act "does not interfere with the right of membership of persons duly entered of the Society and admitted on its Books as Students or Barristers at Law, but leaves them Members of The Law Society of Upper Canada, though not Members of the Corporation of The Law Society of Upper Canada"; 8, powers of Corporation are in trust for the Society, not for the Corporation; 9, Convocation has power to pass Rules; 10, the Act of 1797 makes Rules, etc., subject to the approval of the Judges as the Visitors; 11, "that the Judges have declined either to assent to or dissent from Resolutions of Convocation which did not contain provisions for the general government of the Society expressly on the ground that their authority as Visitors under the Statute did not extend to control any such proceedings of the Convocation." 12, 13, 14, 15, the approbation of the Judges is necessary only to such regulations as provide for the general government of the Society at large, not such as are explanatory of existing Rules and Regulations, or for the regulation of the proceedings of Convocation or executive business. These Resolutions are a satisfactory declaration of the constitution and functions of Convocation and its relation to the Judges.¹⁷

It is still the law that "The Benchers may make rules for the government of the Society and other purposes connected therewith under the inspection of the Visitors."¹⁸ But the radical legislation of 1872 and 1876,¹⁹ enlarging the powers of the Benchers without reference to the Visitors has rendered the "inspection of the Visitors" an empty phrase.

In 1822, at the time of the incorporating Act, the Treasurer was the Solicitor-General 42 Henry John Boulton,²⁰ afterwards, 1829-1833, Attorney General of Upper Canada, and later Chief Justice of Newfoundland; returning to Canada, he became a Member of the Legislative Council. He is the only Solicitor General (so far as I know) who was ever tried for murder; he had been a second in the Jarvis-Ridout duel.

The Benchers were headed by 40 John Beverley Robinson, the Attorney General, afterward Sir John Beverley Robinson, Bart., Chief Justice of Upper Canada from 1829 to 1862, whose life has been written (very inadequately, be it said) by his son.

Then came 7 Allan McLean, of Kingston, one of the original fifteen who met at Wilson's Hotel in 1797; he had been Member for Frontenac in the House of Assembly in the 4th (1805), 5th (1809), 6th (1812), 7th (1816)—in these two he had been Speaker—and was then sitting in the 8th (1820) Parliaments of Upper Canada.

11. Bartholomew Crannell Beardsley, also one of the fifteen fathers; little else is known of him.

18. Levi Peters Sherwood, entered Easter Term, 1801; Called, Hilary Term, 1803. Benchers, Hilary Term, 1818. Judge, Court of King's Bench, 1825.

27. William Dickson of Niagara, a lawyer by grace of the Act of Parliament (1803), 43 George III, c. 3 (U.C.), and of Lieutenant Governor General Peter Hunter; he received a licence under the Act; was Called, Easter Term, 1803; became a Bencher, Hilary Term, 1806. He was a Member of the Legislative Council, 1815, and is best known from his ownership of the Township of Dumfries, his persecution of Robert Gourlay,²¹ the "Banished Briton"; and his killing in a duel, 1806, the turbulent William Weekes, his colleague.

20. William Warren Baldwin from Cork, a graduate in medicine of Edinburgh University, who came with his father, Robert Baldwin, to Upper Canada in the closing years of the eighteenth century. He tried the practice of medicine and teaching. He became Master in Chancery in the Legislative Council and at length, in 1803, received a licence in the same way as Dickson. He was Called, 1803; became a Bencher in Michaelmas Term, 1807, and Treasurer. 1811, 1812, 1813, 1814, and again in 1820; later he was Treasurer in 1824 to 1828,

47. Christopher Alexander Hagerman, of Kingston, son of Daniel Hagerman, one of the fifteen. The son was entered, Michaelmas Term, 1809. Called, Hilary Term, 1815 (he lost time being on active service during the War of 1812); he was gazetted our first K.C., but did not receive a patent,²² Solicitor-General, 1829; Attorney-General, 1837; temporarily Judge of K.B., 1828, and permanently appointed 1840; he died 1847.

34. D'Arcy Boulton, Jr., of York, son of the Judge of the same name; entered Trinity Term, 1803. Called, Hilary Term, 1807. Bencher, Hilary Term, 1818.

41. George Ridout, of York; entered, Hilary Term, 1808. Called, Hilary Term, 1815. Bencher, Easter Term, 1820. Treasurer, 1829-1831; a moderate Reformer, he was to lose his preferment, judicial and military, at the hands of Francis Bond Head.

32. Thomas Ward, who, after failing in an attempt to enter the profession by the backdoor²³ got in by the front door; entered, Easter Term, 1803, Called, Hilary Term, 1808, Bencher, Easter Term, 1820; he had a good practice.

43. Jonas Jones, of Brockville, entered, Easter Term, 1808, Called, Hilary Term, 1815, Bencher, Easter Term, 1820. An active and bitter politician. Member of the Assembly for Grenville; in 7th (1816), 8th (1820), and 9th (1824) Parliaments of Upper Canada; Puisne Judge of Court of King's Bench, 1837-1848.

88. Thomas Taylor, our first Law Reporter, an Englishman, a student but not a graduate of Oxford, a lieutenant in the 41st Regt. of Foot; fought and was terribly wounded in the War of 1812; second to Dr. William Warren Baldwin, in his farcical duel with Attorney General John Macdonell, on Toronto Island (then a peninsula), in April, 1812. Called to the Bar of the Middle Temple, 1817; to the Bar of Upper Canada, 1819; Judge of the District Court of Gore District, Hamilton, 1819. Bencher, Easter Term, 1820. Reporter for the Court of King's Bench, 1823; he died in 1838.²⁴

46. Archibald McLean; entered, Trinity Term, 1808; Called, Easter Term, 1815. Bencher, Easter Term, 1820; Member for Stormont in the 8th (1820); 9th (1824); 10th (1828); 11th (1830) Parliaments—in this he was Speaker of the House; Puisné Judge, Court of King's Bench, 1837; Court of Common Pleas, 1850; Chief Justice of Upper Canada, 1862; and Court of Error and Appeal, 1863; he died 1865.

There had been, up to the beginning of 1822, 65 persons called to the Bar, 112 entered and 34 Benchers appointed.

Of the Benchers, 1 John White, the first Attorney General, and 16 William Weekes, had been killed in duels. 2. Robert Isaac Dey Gray, the first Solicitor General, and 4 Angus Macdonell, had been drowned in the "Speedy" disaster. 3 Walter Roe had been drowned in a shallow pool of water at Sandwich. 20 Thomas Scott had become Chief Justice, had resigned and was living a private life, *otium cum dignitate*, in Muddy York.

28. D'Arcy Boulton entered and Called, Easter Term, 1803; Bencher, Michaelmas Term, 1805; Treasurer, 1806-1811, 1815-1818; Judge, Court of King's Bench, 1818.

33. John Macdonell entered, Easter Term, 1803; Called, Trinity Term, 1808; Bencher, Trinity Term, 1811; Attorney General, 1811; he was killed in action at Queenston Heights, 1812.

39. William Firth, our third Attorney General, had gone to England in disgust, and was allowed to stay there, to his much deeper disgust. He had become a Serjeant and was practising as a local Counsel, at Norwich, poor and discontented.

5. James Clark, of Niagara-on-the-Lake, was dead after some trouble with a dissatisfied client, Lane.

6. Christopher Robinson had died suddenly and somewhat mysteriously a few days after his removal from Kingston to York, November 2nd, 1798.

8. William Dummer Powell, Jr., had "died September 20th, 1803, under circumstances aggravating the anguish of his unfortunate mother and is buried in the Presbyterian burying ground at Stamford, Dorchester." ²⁵

10. Nicholas Hagerman was long dead, and 12 Timothy Thompson had just died, having, in 1820, been a representative to the Grand Lodge, A.F. & A.M.

13 Jacob Farrand died May 11th, 1803, "Register" of Glengarry, Stormont and Dundas.

16 William Weekes had been killed in a duel by his colleague, William Dickson, October 10th, 1806.

Of the other Members of the Law Society, the student at law 24 John Anderson, articled to Walter Butler Wilkinson, entered, Hilary Term, 1803, had been drowned in the "Speedy" shipwreck, October, 1804, and was not Called; 45, James Hamilton, entered, Trinity Term, 1808, was not Called; 57 Isaac Sheek, entered, Hilary Term, 1815, became an Attorney only as did 72 Francis Xavier Rocheleau, entered, Easter Term, 1816, who got into trouble, Easter Term, 1827²⁶; these last two were alive in 1822. 71 William Marshall entered, Easter Term, 1817; 74 William Joseph Robins, entered, Trinity Term, 1817; 78 Daniel Sullivan, entered, Hilary Term, 1818; 79 William Robinson Smyth of York, entered, Easter Term, 1818. 81 James Breckenridge of Niagara, entered, Michaelmas Term, 1818; 89 John Moffatt entered, Easter Term, 1818; 97 George Frederick Thomas Ferguson Hall, of Kingston, entered, Hilary Term, 1820; 104 Horace Ridout, entered, Michaelmas Term, 1820; 105, John Hunter Samson, entered, Hilary Term, 1821; 107 Edward Short, entered same Term; 108 John McDowell, entered, Trinity Term, 1821, and 111 Richard Philips Hotham, entered, Michaelmas Term, 1821, did not take the degree of Barrister of Law (but No. 111

became an Attorney); 63 Allan Napier McNab, entered, Trinity Term, 1816, was not Called till Michaelmas Term, 1826; he became Prime Minister of Canada. 68 John Ridout, entered, Hilary Term, 1817, was killed in a duel by Samuel Peters Jarvis, the same year. One Barrister, 51 Daniel Washburn, of Kingston had been struck off the Rolls for disgraceful crime.

Of the others entered as members there were certainly alive: 29 John Powell of York; 30 William Elliott, of Sandwich; 31 John Tenbroeck, all three entered and Called, Easter Term, 1803; 37 Hamilton Walker, entered, Hilary Term, 1807; Called, Trinity Term, 1811; 48 David Jones, entered, Michaelmas Term, 1809, Called, Hilary Term, 1813; 49 Daniel Jones, entered, Easter Term, 1810, Called, Trinity Term, 1815; 50 Samuel Peters Jarvis, of York, entered, Easter Term, 1810, Called, Trinity Term, 1815; 53 John Breakenridge, of Niagara, entered, Hilary Term, 1815, Called, Easter Term, 1817; 54 George Strange Boulton, of York, entered, Hilary Term, 1815; Called, Michaelmas Term, 1818; 56 Benjamin Fairfield, entered, Hilary Term, 1815, Called, Trinity Term, 1819; 59 John Rolph, entered, Hilary Term, 1815, Called, Michaelmas Term, 1821 (as an English Barrister), Benchèr, Michaelmas Term, 1824; 59 Simon Washburn, of York, entered, Michaelmas Term, 1815, Called, Trinity Term, 1820; Benchèr Michaelmas Term, 1829; 60 Thomas Butler, entered, Hilary Term, 1816, Called, Trinity Term, 1817; 61 James Edward Small, of York, entered, Easter Term, 1816, Called, Hilary Term, 1821, Benchèr, Michaelmas Term, 1829; 62 Robert Dickson, of Niagara, entered, Trinity Term, 1816, Called, Hilary Term, 1821, Benchèr, Michaelmas Term, 1829; 64 Alexander Stewart, of Niagara, entered, Trinity Term, 1816, Called, Easter Term, 1821; 65 Marshall Spring Bidwell, of Kingston, entered, Trinity Term, 1816, Called, Easter Term, 1821, Benchèr, Michaelmas Term, 1829; 66 George Rolph, of Dundas, entered, Michaelmas Term, 1816, Called, Trinity Term, 1821; 112 Robert Berrie, entered and Called, Michaelmas Term, 1821 (a Scottish lawyer); 70 Andrew Norton Buell, Brockville, entered, Hilary Term, 1821, Called, Michaelmas Term, 1821.

Of the Students at Law, who were afterward called, were 67 James Buchanan Macaulay, of York, entered, Hilary Term, 1817, Called, Hilary Term, 1822; Benchèr, Hilary Term, 1825, afterwards, Sir James Buchanan Macaulay, Chief Justice of the Court of Common Pleas; 69 Donald Bethune, of Brockville, entered, Hilary Term, 1817, Called, Trinity Term, 1823; 73 George Macaulay, entered, Trinity Term, 1817, Called, Easter Term, 1822; 75 George Stephen Jarvis, entered, Michaelmas Term, 1817, Called, Hilary Term, 1823; 76 William Dickson, Jr., entered, Hilary Term, 1818, Called, Michaelmas Term, 1822; 77 Daniel McMartin, entered, Hilary Term, 1818, Called, Easter Term, 1823; 80 David William Smith, of York, entered, Michaelmas Term, 1818, Called, Michaelmas Term, 1823; 82 John Muirhead, of Niagara, entered, Michaelmas Term, 1818, Called, Trinity Term, 1823; 83 Daniel Farley; 84 Samuel Merritt, Jr.; 85 James Hunter Samson; 86 Marcus Fayette Whitehead, all four, entered, Hilary Term, 1819, Called, Michaelmas Term, 1823; 87 James Boulton, entered, Hilary Term, 1819, Called, Hilary Term, 1824; 90 Thomas Maybee Radenhurst, entered, Trinity Term, 1819, Called, Easter Term, 1824; 91 Henry Cassady, of Kingston, entered, Trinity Term, 1819, Called, Trinity Term, 1824; 92 George Malloch, of Augusta, entered, Michaelmas Term, 1819, Called, Michaelmas

Term, 1824; 93 John Lyons, entered, Michaelmas Term, 1819, Called, Michaelmas Term, 1826; 94 Charles Coxwell Small, entered, Michaelmas Term, 1819, Called, Easter Term, 1825; 95 Marcus Burritt, 96 Robert Clive, of Cornwall; 98 Richard Cartwright Robison, of York; all three entered, Hilary Term, 1820, Called, Hilary Term, 1825; 100 James Nickalls, entered, Hilary Term, 1820, Called, Hilary Term, 1824; 101 Robert Baldwin, entered, Easter Term, 1820, Called, Trinity Term, 1825, Benchers, Easter Term, 1830; 102 Alexander Chewitt, entered, Trinity Term, 1820, Called, Easter Term, 1825; 103 John Solomon Cartwright, entered, Michaelmas Term, 1820, Called, Michaelmas Term, 1824; 106 Joseph Allan McLean, entered, Hilary Term, 1821, Called, Michaelmas Term, 1825; 109 Charles Richardson, entered, Trinity Term, 1821, Called, Trinity Term, 1825; 110 Alexander Wilkinson, entered, Trinity Term, 1821, Called, Michaelmas Term, 1826.

The former members known to be dead included:

17 Walter Butler Wilkinson of Cornwall, a student of 13 Jacob Farrand's from 1795; entered, Easter Term, 1801; (our first Student-at-Law); Called, Easter Term, 1803, and who himself had as a student the unfortunate 24 John Anderson.

21 Henry Bostwick of Niagara, articulated to 9 Alexander Stewart; entered, Hilary Term, 1803; Called, Hilary Term, 1808.

22 John Lowe Farrand of Cornwall, son of 13 Jacob Farrand; entered, Hilary Term, 1803; Called, Hilary Term, 1806.

25 William Birdseye Peters of Niagara (and later, York), entered and Called, Easter Term, 1803; a Licensee under the Act of 1794; he was the son of the well-known United Empire Loyalist, the Rev. Samuel Peters, of Hebron, Connecticut. William Birdseye Peters matriculated at Trinity College, Oxford, in 1792, at the age of 18, and became a Student of the Middle Temple the same year.

35 John Robert Small of York, entered, Michaelmas Term, 1803; Called, Easter Term, 1808.

36 Edward Walker "late of Augusta, Gentleman," articulated to 16 William Weekes; entered, Hilary Term, 1806; Called, Hilary Term, 1810.

38 Jonathan Jones of Brockville, entered, Hilary Term, 1807; Called Michaelmas Term, 1811.

44 James Cartwright, "late of Quebec . . . Attorney, Advocate and Counsel . . . in the Province of Lower Canada"; entered and Called, Trinity Term, 1808.

52 Daniel Hagerman, son of 10 Nicholas Hagerman, and brother of 47 Christopher Alexander Hagerman; the only quiet one of the whole family connection; entered, Hilary Term, 1815, as of Michaelmas Term, 1811; Called, Michaelmas Term, 1815 (he was to have been entered in Michaelmas Term, 1811, but there was no quorum of Benchers available; see Minutes of Meetings of Benchers, February 25th, 1815).

55 Robert Macauley of York, entered, Hilary Term, 1815, as of Trinity Term, 1814, Called, Trinity Term, 1820 (see same Minutes).

NOTES

¹I should not have thought it necessary to say so much of the original Law Society of Upper Canada (much of the story of which is to be found in my "Legal Profession in Upper Canada," published by the Law Society, Toronto, 1916) but for what seems to be a widespread ignorance of that original Society. For example in an article in a Toronto newspaper by a prominent member of the Bar, I count fourteen distinct misstatements of facts, without mentioning the many erroneous suggestions and implications.

²I am not responsible for the composition — *Rex super grammaticam*.

³David William Smith (afterwards a Baronet) who received a licence to practise under the Act of 1794; 34 George III, c. 4 (U.C.) from Lieutenant Governor Simcoe, July 7, 1794; he was Acting Surveyor-General and Deputy Judge advocate at Niagara.

Davenport Phelps who did not sign the Roll after he received a licence under the same act; he consequently, according to the letter of the law, was not "authorized to receive fees, &c; he became a clergyman and finally removed to a charge in New York State.

Richard Barnes Tickell also received a licence under the Act of 1794; he certainly practised as an Attorney and Barrister at Niagara. I find his name as Counsel and "Agent for A. McLean, Attorney for Plaintiff" in two cases in the Court of King's Bench, January 26, 1795. He seems to have ceased to practise, as he certainly was not in practice in 1797.

Charles J. Peters was admitted without a licence; he signed the Roll and was qualified to practise, but it does not appear that he ever did. He was a brother-in-law of Jarvis, the Provincial Secretary, and the son of the celebrated Rev. Dr. Peters.

⁴John White, Attorney-General.

Robert Isaac Dey Gray, Solicitor-General.

Angus Macdonell of York.

James Clark formerly of Kingston, then of Newark.

Christopher Robinson of Kingston.

Allan McLean of Kingston.

William Dummer Powell, Jr., of Newark.

Alexander Stewart of York. (?)

Nicholas Hagerman of Adolphustown and

Bartholomew Crannell Beardsley.

Five practitioners were not present

Walter Roe of Sandwich.

Timothy Thompson of South Fredericksburgh.

Jacob Farrand of Cornwall.

Samuel Sherwood of Augusta (near Prescott) and

John McKay.

Gray, Robinson, Thompson and Smith were Members of the House of Assembly, 1797-1800; White and Smith had been Members in the previous House, 1792-1796 (the first in Upper Canada,) but White failed to obtain a seat because of his advocacy in 1793 of the Act forbidding future slavery; Gray, Sherwood, Thompson, Macdonell and Smith were Members of the third House, 1800-1804; Gray, Sherwood, McLean and Macdonell of the fourth, 1804-1808; McLean of the fifth, 1808-1812; McLean and Thompson of the sixth, 1812-1816; McLean of the seventh, 1816-1820, and eighth, 1820-1824.

The meeting, July 17, 1797, was at Wilson's Hotel, Newark, (now Niagara-on-the-Lake). The Hotel was also called the British Hotel; it was a frame building, a storey and a half high, on the S.E. corner of Queen and Gate Streets, still standing about half a century ago.

⁵The alternative denomination authorized by the statute, "Governors," was not used until 1799.

⁶The currency pound (Halifax, Canadian or Provincial currency) was at that time nine-tenths the value of the pound sterling, i.e., the old Par of Exchange was £1 = \$4.44-4-9; accordingly the annual fee was about \$22.

⁷These Rules were passed, July 17, 1797, but not approved until July 13, 1799, the day of the second meeting of the Society.

⁸William Weekes, a notorious agitator, an Irishman, formerly the student of Aaron Burr; he was killed in a duel at the old Fort Niagara, N.Y., October 10, 1806, by his friend and colleague, William Dickson.

⁹The list of persons to whom notice was to be sent shows that all the fifteen original Barristers were still alive, except Christopher Robinson who had died at York, November 2, 1798.

¹⁰On Monday, November 4, 1799, attended (1) White, the Attorney-General, (2) Gray, the Solicitor-General, (3) Macdonell, (4) Powell and (5) Weekes. On Thursday, November 7, and Saturday, November 9, attended these five and (6) Clark and (7) Stewart.

¹¹These Rules were approved by the Judges, January 16, 1800. We shall see how the Act of 1822 impliedly ratified this last Rule.

The meetings are entered in the official register as meetings of the Society uniformly until Hilary Term, 1803; then they are called meetings of the Benchers until February 18, 1807, for which day and November 14, they are called Meetings of the Law Society; except for a short time in 1817 the meetings thereafter were meetings of the Benchers.

¹²Until Osgoode Hall was ready for occupation by the Society, February 6, 1832, the usual place of meeting was the Treasurer's office; I have noted meetings at the Library of the Legislative Assembly, January 10 and 12, 1821, January 21, 1823, January 21, 1825, November 3, 7, 11 and 13, 1829; at the Speaker's Room, House of Assembly, January 28 and 31, 1823; at Judge's Chambers, November 15, 1827; at the Court House April 25, July 13, 1822, January 11, 1828, January 9, 10, April 22, May 2, June 16, 20 and 24, 1829.

¹³At the meeting, July 8, 1819, there were present only three persons, the Attorney-General John Beverley Robinson, the Solicitor-General Henry John Boulton and D'Arcy Boulton, his brother. There was not a quorum under the Rule of November 9, 1799, which required five; at the Michaelmas meeting which elected Boulton, Treasurer, the same three persons and Dr. Baldwin were present, only four in all.

¹⁴Sometimes there was trouble about the finances; e.g., in Michaelmas Term, 5 George IV, 1824, when Dr. Baldwin succeeded Henry John Boulton as Treasurer, it was resolved "that the late Treasurer do, so soon as practicable, make up the accounts of the Society to be handed over to the Treasurer for the current year; that the present Treasurer be authorized to loan upon a Bond to the late Treasurer or any other responsible person to the extent of £500 payable in two years with interest, and that the balance remaining on the late Treasurer's accounts, so soon as paid over to the present Treasurer be by him laid out in the purchase of stock in the Bank of Upper Canada."

Baldwin's accounts as Treasurer are extant. They show Boulton indebted to the Society in the sum of £895.10; in 1820 he had owed £90.

¹⁵See Journals Ho. Assy. U.C. 1821, 1822, 11 Ont. Archives Rep. (1915), pp. 40, 43-47; Journals Leg. Council, U.C. 1820-1822, 12 Ont. Archives Rep. (1915), pp. 8, 10, 12, 15.

On the divisions the following members of the House voted consistently for the Bill without Amendment.

1 John Beverley Robinson (Attorney-General) of York Town.

2 Archibald McLean of Stormont.

3 William Willcocks Baldwin of York and Simcoe.

4 Jonas Jones of Grenville.

5 Christopher Alexander Hagerman of Kingston.

6 Barnabas Bidwell of Lennox and Addington.

7 Peter Robinson of York and Simcoe.

8 John Bostwick of Middlesex.

9 Mahlon Burwell of Middlesex.

10 Samuel Street Wilmot of Durham.

11 William J. Kerr of 2nd Lincoln.

12 Philip Van Koughnet of Stormont.

13 Walter F. Gates of Grenville.

14 Peter Shaver of Dundas.

15 Alexander Macdonell of Glengarry.

all of whom voted in the three Divisions.

16 Henry Ruttan of Northumberland (Nos. 1, 2.)

17 David McGregor Rogers of Northumberland (Nos. 1, 2.)

18 Robert Hamilton of 3rd Lincoln (Nos. 1 and 3.)

who voted in two of the Divisions.

19 Alexander McMartin of Glengarry (No. 3.)

who voted in one Division.

The following consistently opposed the Bill:

20 Charles Jones of Leeds.

21 Robert Randall of 4th Lincoln.

22 George Hamilton of Wentworth.

23 John Willson of Wentworth.

24 Reuben White of Hastings.

25 Samuel Casey of Lennox and Addington.

all of whom voted in the three Divisions.

26 John Clarke of 1st Lincoln (Nos. 1 and 3.)

27 Thomas Horner of Oxford (Nos. 2 and 3.)

who voted in two Divisions.

In favour of the Bill but in favour of fixing fees by Statute:

28 David Pattie of Prescott and Russell.

In favour of the Bill at first but in favour of fixing fees by Statute and of rejecting Bill without the amendment:

29 James Willson of Prince Edward.

Opposed to Bill throughout as well as to fixing fees by Statute:

30 Paul Peterson of Prince Edward.

Opposed to Bill at first and opposed to fixing fee by statute and voted for final passing:

31 William Morris of Carleton.

Did not vote on original motion but opposed the amendment and the final passage:

32 William Chisholm of Halton.

33 Francis Legh Walsh of Norfolk.

The following did not vote:

34 The Speaker, Levi P. Sherwood of Leeds.

35 James Crooks of Halton.

36 Robert Nichol of Norfolk.

37 Francis Baby of Essex.

38 William McCormick of Essex.

39 James Gordon of Kent.

40 Allan McLean of Frontenac.

Nos. 1, 2, 4, 5 and 40 were Benchers, No. 1 the Treasurer. No. 6. had been Attorney-General of Massachusetts and was Managing Clerk in an Attorney's office in Kingston. No. 7 was the brother of No. 1 and the son of a lawyer. No. 12 the father of our second Chancellor. The others had no direct connection with the Law.

¹⁶By the Statute (1850) 20 Vict. c. 63 (Can.) the Law Society was required to examine into the fitness and capacity of a would-be attorney or solicitor and it was only on production of a certificate of Fitness from the Law Society that the Judges could admit the aspirant.

¹⁷The "Judges" were of course the Judges of the Court of King's Bench; the Court of Common Pleas was not instituted until 1849 which year saw the Court of Chancery remodelled from that previously existing from 1837. The Judges during the period in question were:

Chief Justices, William Dummer Powell, 1816-1825; Sir William Campbell, 1825-1829; Sir John Beverley Robinson, 1829-1862. Puisné Justices William Campbell, 1811-1825; D'Arcy Boulton, 1818-1827; Levi P. Sherwood, 1825-1837; John Walpole Willis, 1827-1829; James Buchanan Macaulay, 1829.

¹⁸This terminology was first introduced in 1859, C.S.U.C. c. 33, s. 5; it has been retained ever since in all the legislation, consolidation and revision; the language of sec. 3 of the Act of 1797 was "with the approbation of the Judges."

When the Courts of Common Pleas and Chancery were formed in 1849 by the Acts 12 Vict. cc. 63, 64 (Can.), the Judges of these Courts were added as Visitors of the Law Society by the Statute (1850) 13, 14 Vict. c. 51, s. 2.(Can.)

¹⁹See (1872) 35 Vict., c. 6, ss. 4, 5, 8 (Ont.); (1876) 39 Vict., c. 31, ss. 1, 2, 3, 7 (Ont.); the constitution of Convocation had already been revolutionized and democratised by the Act of 1871, 34 Vic., c. 15 (Ont.). See now R.S.O. (1914) c. 157.

The "approbation of the Visitors" is still required in rules "for conducting the examination of Solicitors" R.S.O. (1914) c. 157, s. 44 (1). The original legislation on this subject is the Act of 1857, 20 Vict., c. 63, s. 19 which provides that the Rules, etc., are to be approved by any three or more of the Judges of the three Superior Courts, at least one from each Court. This was substantially re-enacted in 1859, C.S.U.C., c. 35, s. 7; R.S.O. (1877), c. 138, s. 39; c. 140, s. 8, the present terminology was introduced on the revision of 1887. R.S.O. (1887) c. 145, s. 41, c. 147, s. 9.

²⁰I prefix the No. of each person in the "Common Roll of Members of the Law Society of Upper Canada."

²¹See my "Life of Robert (Fleming) Gourlay," Ontario Historical Society's "Papers and Records," Vol. 14, Toronto, 1916.

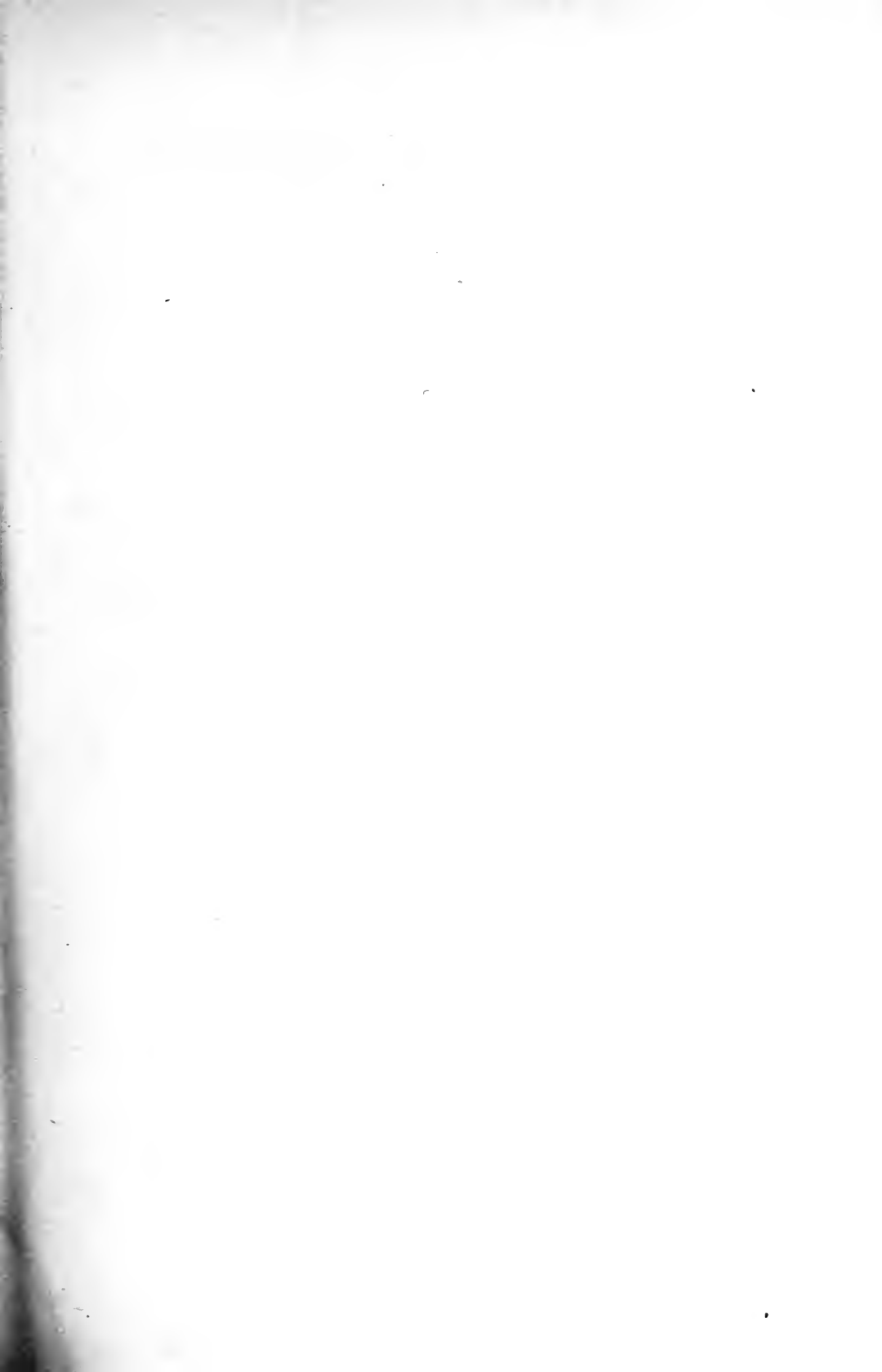
²²See my article in Can. Law Times, 1929. "The First (and Futile) Attempt to create King's Counsel in Upper Canada."

²³See my article "Robert Isaac Dey Gray," 41 Can. Law Times, (June, 1921), at pp. 429, 430.

²⁴See my address "The First Law Reporter in Upper Canada and his Reports", Canadian Bar Association, Toronto, June, 1916.

²⁵These were the words written by his mother in the Family Bible; John Powell (his brother) and Joseph Edwards in Petition for Letters of Administration give the date of death, September 23rd, 1803.

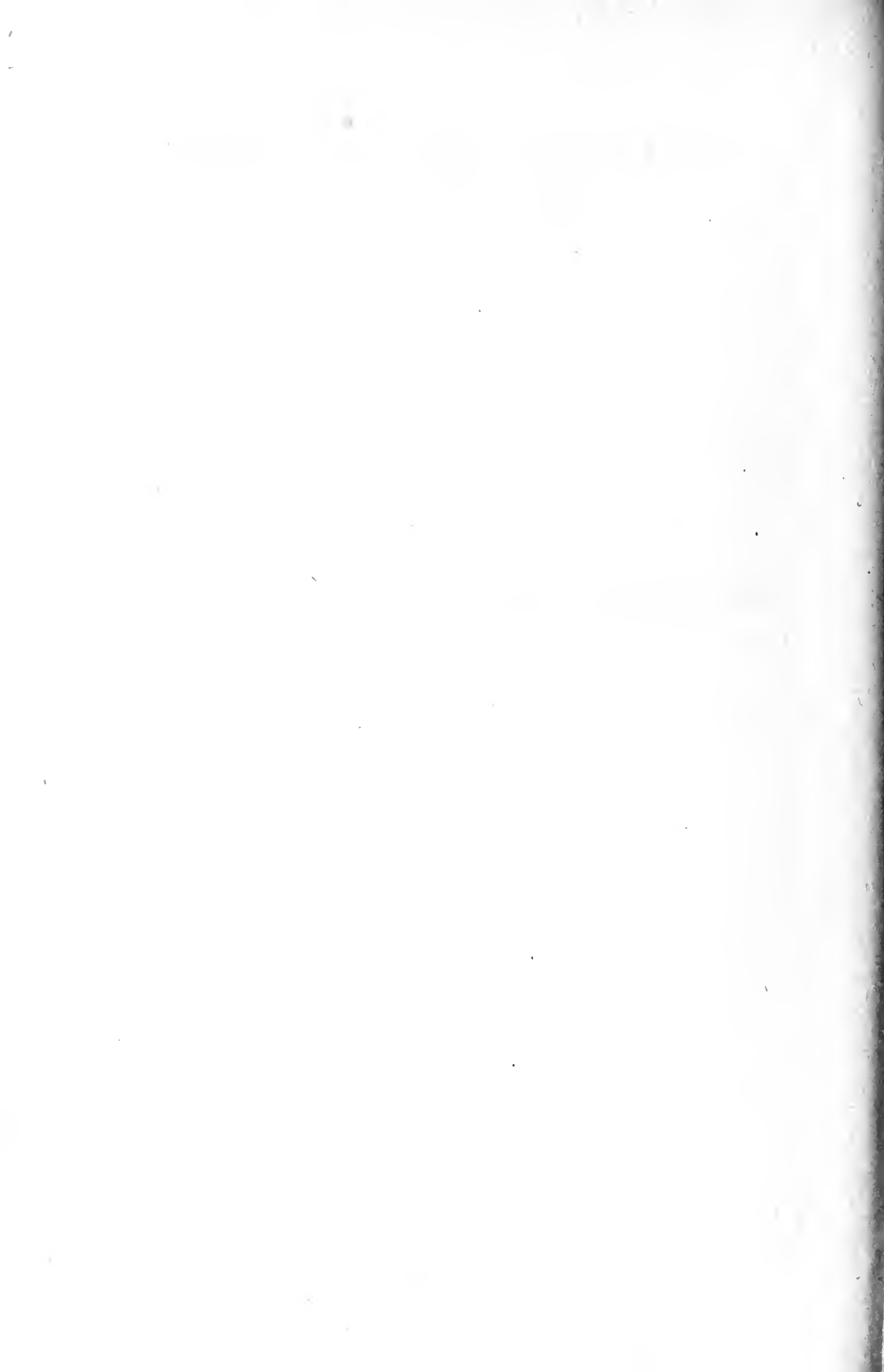
²⁶See my "Legal Profession in Upper Canada, etc.," pp. 29, 30, (nn.) 22, 23; also "The Court of King's Bench in Upper Canada, 1824-1827" 49 Can. L.J. (1913) pp. 49, 98, 126, 209.



A Renaissance Physician's Tribute to a Deceased Colleague

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.



A Renaissance Physician's Tribute to a Deceased Colleague

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F.R.S.C., ETC.

EVERYONE has heard of Odium Medicum, the jealousy and enmity toward each other of medical practitioners, second only to the Odium Theologicum, if even to that.

The well-known doctor who would take anything from his confrere but his medicine, was outdone by Dr. Sir Samuel Garth, who retaliated on his competitor, Dr. Sir Richard Blackmore—whom, by the way, he dubbed “the merry poetaster of Saddlers’ Hall in Cheapside”:

“Unwieldy pedant let thy awkward muse
With censures praise, with flatteries abuse;

Thy feeble satires ne’er can do him wrong,
Thy poems and thy patients live not long.”

Much more pleasant is it to recall words and acts of friendship by medical men toward each other.

Dr. Richard Mead, a convinced Whig, when called to attend Walpole, refused to prescribe for him until he should release Dr. John Freind from the Tower into which he had got himself in his violent Toryism by taking part in Atterbury’s mad scheme for reinstating the Stewarts—and Mead and Freind had nothing in common but their scholarship and their profession—they differed in politics, in theory of medicine and its practice as well as in nearly everything else.

One very beautiful instance of appreciation by one doctor of another comes to us from the Italy of the Renaissance.

In Verona, early in the Sixteenth Century, lived two very celebrated physicians, between whom there was the greatest rivalry. Both were able, zealous and learned; one, Girolamo Fracastoro, was of the first rank, not only in medicine, but also in mathematics, astronomy and philosophy, while no less competent an authority than Julius Caesar Scaliger pronounced him second to Vergil alone in Latin verse. The other, Joannes Baptista Montanus, was of high rank in medicine, but though learned, he had not the facility of Fracastoro in verse—he made up for this deficiency by the intensity of his hostility to his colleagues.

On the death of Montanus (1540) all enmity was forgotten; and

Fracastoro wrote the following elegiacs in memory of his former adversary:

"In mortem Joannis Baptista Montani,
Medici Veronensis.
Dum medica, Montane, doces ope vincere fata
Et Lachesi inuita, viuere posse diu
Lethaeo indignans pressit te Parca, sopore
Et secuit vitae grandia fila tuae
Sic, animas et tu Aesclepidēs subtrahis orco
Te quoque saeuorum perdidit ira Deum."

"On the death of Joannes Baptista Montanus, Physician of Verona: While, O Montanus, thou art teaching by the help of medicine to conquer the Fates, and against the will of Lachesis to be able to live long, indignant Fate has pressed thee down with the sleep of Lethe and cut the great cords of thy life. Thou, too, a son of Aesculapius, drawest souls from death, and thee, too, the wrath of the vengeful gods hath destroyed."

Is it possible that Milton, who read everything, had these lines in mind when he made Lachesis "with her abhorred shears," "slit the newspun life?"

In any case, the comparison of the physician to the great founder of his art both in his skill and in his fate is as beautiful as it is creditable to the charity of the author—it will be remembered that in the old myth, Aesculapius was slain by the angry gods for preserving so many souls from Hades, but he was taken to Heaven by Jove—Fracastoro, no doubt, suggests the same happy fate for the son as for the great father.

The members of the third of the learned professions, the Gentleman of the Long Robe, have not generally carried professional controversy into private life—as a rule, they

"Strive mightily, but eat and drink as friends
There is no such thing as Odium Forense."

Osgoode Hall, Toronto,
June 23, 1923.

Teeth in Olden Times

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., ETC.

WITHIN historical times, there never has been a period in which the teeth have not been an object of care and, on occasion, of pride.

Artificial teeth have been found in Egyptian mummies—the lady of King Tut's time and country had her beautiful "store-teeth" as well as her lip-stick and perfumery quite on a par with our modern flapper—indeed the modern Canadian cannot always crow over her ancient Egyptian sister even in her bobbed hair. The hard-boiled historian of Medicine says of these old artificial teeth that they are "an evidence that dentistry and dentists are at all events as old as the coquetry for which Egyptian women were notorious".¹

In Ancient Greece, we find the *odontogluphon* corresponding to the Latin *dentiscalpium* which the lexicographers solemnly define: "*quo ea quae dentibus inhaerent eximuntur*", i.e., an instrument by which that which sticks in the teeth is taken out—Anglicé, a tooth-pick. Then there are *odontotrimma*, a dentifrice or powder for scrubbing the teeth and gums; and *apodontosis*, abstersion of the filth around the teeth. The torture of tooth-ache is not lacking—that was *odontalgia*; the forceps for drawing teeth was *odontagra* or *odontaggon*, called by the Romans, *dentiducum*, a very celebrated one being of lead. The man without teeth was *anodous*, or *nodos*; he with white teeth, *argiodous*, or *argiodon*; if his teeth were rough, serrate, etc., he was *karcharodous*, and if he had a jaw with only one tooth, that is, with the teeth grown together he was *monodous*, like the son of Prusias, King of Bithynia, "who had one bone in the place of teeth" says Festus; or Pyrrhus, King of Epirus, "who is said to have had teeth grown together". One with prominent teeth was *proodous* and one who fought with them was *odontomaches*. I do not find any specific name, however, given to dentists: although Herodotus does mention physicians for the teeth.

No one can peruse the long list of compounds of the word *odous* in

¹ *Outlines of the History of Medicine* . . by John Hermann Bass, M.D., Dr. Handerson's edition, N.Y., 1889, p. 15.

Greek² without appreciating the high regard which that marvellous people had for their teeth and the great care which they took of them. Cicero, indeed, tells us that the third *Aesculapius* was the first—"so they say"—to discover tooth-drawing.³ But the practice was not approved unless absolutely necessary: three hundred years before Christ, the aphorism already had vogue "Don't pull, cure"; and it was almost a binding rule never to extract teeth unless they were so loose as almost to come out by themselves.⁴ The celebrated Erasistratus whose most marked characteristic was aversion from bloodletting recommended that forceps should be made of lead so that no tooth should be drawn that was not so loose and wobbly that it could be drawn by lead forceps, that is without any force or violence—one rather wonders what he would have said to the diabolical turnkey which every doctor had half a century ago. Forceps of lead were openly displayed in the Temple of Apollo, the God of Healing.⁵

²*Odous*—genitive, *odontos*—is, of course, Greek for a tooth. The compounds of *odous* with references fill three folio columns of Stephanus' ponderous *Thesaurus*, vol. iii, coll. 3,481 B-3,484 A.

³Cicero, *De Naturâ Deorum*, Lib. iii, c. 22, enumerates three Aesculapii; the first was the son of Apollo and Coronis, "the bearded son of a beardless father", as the Greek wags called him; he discovered the *specillum*, the sound or probe for examining the depth of wounds, ulcers, etc., and was the first to bandage wounds. This is the God of Medicine. The second Aesculapius was struck by lightning and lies buried in Arcadia. The third, the son of Arsippus and Arsinoe "qui primus purgationem alvi, dentisque evulsionem, ut ferunt, invenit"—"who was the first, so they say, to discover purging and tooth extraction". Cicero knew as much about such things as anybody—and that was not much.

⁴After centuries of orgies of tooth-pulling, and the sacrifice of millions of good serviceable teeth we are about back to the Greek idea. Dr. Box will save millions more—more power to his elbow!

⁵We owe to Caelius Aurelianus (a very celebrated Latin physician concerning whose period there is much uncertainty, some placing him in the 1st century, A.D., and some as late as the 5th) the information that the lead forceps came from Erasistratus. See Caelius Aurelianus, *De Morbis Chronicis*, Haller's Edition, Lausan, 1774, Vol. ii, p. 135—the passage is part of Aurelianus' *Chronicles*, lib. ii, c. 4. The passage is given *verbatim* in Du Canges' *Glossarium Mediae et Infimae Latinitatis*, Vol. ij, p. 802, *sub voc* "Dentiducum"—I extract the substance: "plumbum odontagogum . . . apud Delphos in Apollinis templo ostentationis causa propositum quo demonstratur oportere eos dentes auferri, qui sint faciles, vel mobilitate laxati, vel quibus sufficiat plumbei ferramenti conamen ad summum".

The dentiducum for drawing teeth was also called *forfex dentaria* or in late Latin *dentaria*—"ferrum unde Medici dentes tollunt".

Erisistratus of Iulis in Cos lived in the 3rd and 4th centuries, B.C., in Antioch and Alexandria. His most famous medical feat was the diagnosing of the puzzling illness of Antiochus, son of King Seleucus Nicator, as being love for Stratonice his stepmother; he got a fee of 100 talents (say \$100,000). He rejected Hippocrates, discarded bleeding and purgation and was the prototype of Hahnemann in his theory of the powerful effects

Hippocrates the Father of Medicine advises that in toothache where the tooth is carious and loose, it should be extracted, but if the tooth aches without being carious or loose, it should be burned⁶—this was done by passing a red hot iron lightly and rapidly over the gum. Hippocrates never extracted unless it was absolutely necessary.

When we reach Rome we are on pretty firm ground; it does not seem to be certain when and where artificial teeth were invented; but by the times of Martial (A.D. 43-104) they were certainly in use. The satirist, addressing an old girl, Galla, after gibing her with wearing a wig and using paint, says—"and at night, lay aside your teeth like your silks".⁷

The same satirist indicates that a whole set of teeth made of bone or ivory could be procured. Addressing Fidentinus, who aspired to be considered a poet, Martial asks:

of the smallest dose of medicine; he invented a catheter and just missed discovering the circulation of the blood—had it not been for the old theory of *pneuma* he probably would have done so.

⁶See Hippocrates, *Peri Pathon*: De Affectionibus, Sec. 4. It should be said, however, that there is much doubt whether Hippocrates really wrote this book—it will be found in Kühn's useful edition, vol. ii, p. 380. Littré's splendid edition has this in vol. vi, p. 213. I find in Hippocrates' celebrated *Aphorisms* only three references to the teeth. I translate.

Aph., iii, 25.

At the time of dentition there is pruritus of the gums, fevers, convulsions, diarrhoea and particularly when they are producing canine teeth. . . .

Aph., v, 18.

Cold is harmful to the bones, teeth, nerves, cerebrum, spinal marrow; heat is beneficial.

Aph., iv, 53

Fevers become more acute in those around whose teeth viscous matter forms.

7

Cum sis ipsa domi, mediaque ornare Suburra

Fiant absentes et tibi, Galla, comae;

Nec dentes aliter quam Serica reponas

Et jaceas centum condita pyxidibus

Nec tecum facies tua dormiat; innuis illo

Quod tibi prolatum est mane, supercilio

Martial, Epig., ix, 38.

"When you are at home, doctor yourself up with paint and powder, leave off the wig, too—lay aside at night your teeth no otherwise than your silk garment and throw a hundred secret things in their boxes—and don't let your own face sleep with you—beckon with that eyebrow which is brought to you in the morning (out of the box)." The rest of this scurrilous Epigram, I do not copy even in the decent obscurity of a learned language—it is too vile for even the Delphin editors to paraphrase. The lady did not wear silk pyjamas—she, like all others till a few generations ago, lay "in naked bed".

Who Galla was does not appear; and the commentators do not help us—she seems to have been just "that d— French-woman".

"So, Fidentinus, you wish to be considered a poet by our verses and hope to be believed? That's the way Aegle seems to herself to have teeth, bone ones bought or of Indian ivory—that's the way the painted Lycoris who is blacker than a falling mulberry seems to herself all right—and you by the same logic as that by which you make yourself out a poet, will have long hair when you are bald".⁸

These sets of teeth were bound together by gold wire and in some way attached to the gums.⁹

Celsus who lived about the beginning of the Christian era at Rome, and who was an authority in medicine almost to our own times, was of much the same opinion as Hippocrates not to pull a tooth unless it was too wobbly but to burn the gum—he advised to fix the loose teeth and tie them to their neighbours with gold wire.¹⁰ Celsus has a good deal about teeth, he advises bursting hollow teeth by peppercorns pressed into them, and seems to have been well acquainted with the results of extraction in cases of ankylosis of the teeth and alveoli, caries and necrosis; his plan was to shake the tooth loose, most painfully, before applying the forceps¹¹—not quite our modern local anaesthesia.

It would be wearisome even were it possible to trace the progress, generally downward, of the science of the teeth through the Middle Ages—let us make a rest at the 14th century.

Much of the knowledge and skill of the Romans was lost but there undoubtedly were dentists—of a sort. So far as can be made out, they seem to have been mostly employed in drawing teeth but toward the end

*Nostris versibus esse te Poetam,
Fidentine, putas, cupisque credi?
Sic dentata sibi videtur Aegle
Emtis ossibus, Indicoque cornu:
Sic, quae nigrior est cadente moro
Cerussata sibi placet Lycoris.
Hac et tu ratione, quâ Poeta es,
Calvus cum fueris, eris comatus.

Martial, *Epig.*, lib. i, 73.

These Fidentinus, Aegle and Lycoris are all unknown to fame.

⁹So says Cicero (or whoever was the author of *De Legibus*), lib. ii, c. 24.

¹⁰Auro cum iis qui bene haerent vincienti sunt—"they are to be tied with gold to those which are holding fast". Celsus, *De Medicina*, lib. vii, c. 12 (1).

¹¹See as to Celsus, Bass, *op. cit.*, pp. 161, 162: he was the father of Mediaeval medicine. Apparently the Hindus and Egyptians long before this time "attempted to replace lost teeth by attaching wood or ivory substitutes to an adjacent sound tooth by means of threads or wires, but the gold fillings reputed to have been found in the teeth of Egyptian mummies have . . . been shown to be superficial applications of gold leaf for ornamental purposes". *Encyclopedia Britannica*, 11th Ed. *sub voc.*, "Dentistry". Our coloured brethren and sisters still have a fondness for gold teeth—a failing not wholly unknown in the white races.

of that century we find a remedy for toothache, a gargle with a decoction of sage-leaves.¹²

François I who came to the throne in 1515 had a dentist,¹³ so far as I can find the first Royal Dentist named as such—his Royal Physician Dr. Jean Goeurot paid much attention to the teeth and had a crowd of remedies for toothache which he characterised as the most annoying of all sufferings. He recommended to hold in the mouth, camphor water or a decoction of camphor in vinegar, to put in a carious tooth a little cotton soaked in the oil of spikenard, to gargle with a decoction of camomile, mint and rue in hot wine.

For cleaning the teeth, the base of all the preparations was deers' horn.

About the same time, Erasmus in his *Civilité*, published in 1530, tells us that many different powders were used for that purpose; some rubbed the teeth with salt and alum and "many persons had the strange custom of cleaning the teeth with their own urine".¹⁴ Laurent Joubert, Royal Physician to Henry III, preferred to this wine diluted with water: and most will agree with him.¹⁵

The cures for toothache were endless. Brantôme tells us that the Queen of Spain had sent him when he had the toothache "a very singular herb—when he took it and held it in the hollow of his hand, the pain suddenly ceased"¹⁶—the same phenomenon has been known to appear in modern times on approaching a dentist's office or on the exhibition of forceps by the dentist. The marvellous herb was the dictamnus. Another used cotton soaked in oil, others pepper, cloves, sage, spikenard, poppy, mandrake, hyoscyamus—some applied to the temple a plaster of gum elemi (a stimulant gum obtained from various kinds of trees)

¹²Much of the information in this part of the paper is derived mediately or immediately from Alfred Franklin's entertaining series *La Vie Privée d'Autrefois*, Paris, 1894. There is no pretence here of originality; and I trust that this general acknowledgement may make it unnecessary to specialize. I have verified quotations and statements wherever possible. The "gargarisme" is given in *Le Menagier de Paris*, Paris, 1393, vol. ii, p. 25.

¹³The Royal Dentist was Guillaume Coureil: Francis died of syphilis, but that is a matter of detail.

¹⁴Within half a century I have known in Ontario a family of French Canadian origin use the same dentifrice; and I am assured by one who should know that this custom still prevails among the peasants of Normandy.

¹⁵Laurent Joubert (1529-1583) was Chancellor of the famous medical school of Montpellier. It is said that of his work *Erreurs populaires au fait de la Médecine et Régime de Santé*, 6,000 copies were sold in six months; his most revolutionary doctrine was that a foul smell was not conclusive evidence of putridity. He did not—as he might—cite our skunk!

¹⁶See Brantôme's *Oeuvres* (1740), Vol. viii, p. 13; Pierre de Brantôme (1540-1614) is a celebrated French chronicler.

with a little powder of cantharides—"it's a marvellous thing, the effect of this remedy", says the enthusiastic writer. Some advised bleeding; the celebrated Guy Patin writing June, 1661, says: "I had a severe toothache yesterday which compelled me to have myself bled on that side: the pain instantly ceased as by a kind of enchantment. I slept all night; this morning the pain returned a little; I had myself bled on the other arm and was immediately cured"¹⁷—which looks like neuralgia.

Tobacco or snuff was also "a marvellous" remedy to relieve toothache.

As to caries, in addition to the excrements, fluid and solid, of the wild cat ("approved by two of the Regents of the Faculty of Medicine" in Paris)¹⁸ there was used a vegetable essence whose composition is, alas! concealed from us.

A certain Sieur Rebel in 1540 brought from Egypt, "a water which destroyed toothache on the spot—it takes one by the nose and makes one weep abundant tears"—but a phial of four doses cost a louis d'or.¹⁹ As a louis d'or was worth intrinsically about \$4.60, equivalent to some \$70.00 at the present time, it will be seen that the remedy was rather dear—but who with the toothache and the money would hesitate?

In the country, we are told, a very favourite remedy was to rub the tooth with the tooth of a dead man.²⁰

Local anaesthesia is not a new discovery. Writing in 1610, de Courval²¹ tells us how a certain charlatan tooth drawer proceeded—he used no instrument but his two fingers, the thumb and the index finger, "before drawing the tooth which the patient wished removed he touched it with his two fingers on the point of one of which he, talking all the time, placed a little narcotic or stupifying powder, so as to put the part to sleep and make it insensible and without feeling. And on the other finger he put a powder marvellously caustic, which had so rapid an operation that in the very moment he made a cut or opening in the

¹⁷A letter from Gui Patin to his friend and pupil Noël Falconet, June 19, 1661. Gui Patin (1601-1672), a French physician (and also wit and free thinker), a friend and pupil of Riolanus, graduated M.D. in Paris, 1627, and practised in that city all his professional life, becoming Dean of the Faculty and Professor of Medicine. He was a determined enemy of antimony and chemical medicine generally. He was the first to note a case of tubal pregnancy, which he attributed to a straying of the ovum. A great scholar and humanitarian, his chief consolation on his death bed was that he would meet in the other world, Aristotle, Plato, Vergil, Cicero and his beloved Galen.

Noël Falconet (1644-1734) of Lyons was a pupil of Patin's but was of the opposite school, an iatrochemist and a thoroughgoing follower of Sylvius.

¹⁸So says the surgeon, B. Martin, in his *Dissertation sur les Dents*, Paris, 1679, p. 64.

¹⁹N. de Blégnny, *Le livre commode pour* 1692, vol. 1, p. 172, vol. ii, p. 178.

²⁰J. B. Thiers, *Traité des Superstitions*, Paris, 1697, vol. i, p. 375.

²¹Dr. Th. Sonnet de Courval; *Satyre contre les charlatans et pseudomédecins empiriques*, 1610; see pp. 107, sqq.

gum, it displaced and uprooted the tooth so that as soon as he touched it with his two fingers only he extracted it and sometimes it fell out without being touched". What these powders were we are not told; but the author assures us that it was impossible for any pain to appear "by reason of the said narcotic powder which was placed there at the same time as the caustic, the one on one side of the gum and the other on the other"—*Credat Judaeus Apella*.

However, the author informs us: "It is an assured fact as I have heard said by persons of standing and trustworthy, that most of those whose teeth were drawn by this charlatan afterwards fell into great fluxions and catarrhs by reason of the attractions which had been excited in these parts by the said violent powders: and with some, all the teeth fell out, so that having determined to have only one or two drawn, they were thunderstruck to find that they lost nearly all—a thing miserable and deplorable!"

Now, that man was a quack; but the regulars were not without their anaesthetic—here is the formula:

Take two ounces of red roses, boil them for a day and a night in strong vinegar; then dry them; take enough and put on the tooth and it will fall out.²²

Here is another:

Boil and then reduce to a cinder, earthworms: fill the hollow tooth with that powder and close it with wax. It will fall out.²³

²²*Les secrets du Seigneur Alexis* Paris, 1691, p. 351. Seigneur Alexis was Girolamo Ruscelli who died, 1566.

²³Madame Fouquet; *Recueil de remèdes faciles et domestiques*, 1578, p. 73.

It may be of interest to note here that Dubois, the exodontist charged with drawing the teeth of Louis Quatorze used for that purpose an *elevatoire* of new invention. We are not told of what material that instrument was made though Dionis praises it almost fulsomely. But Dionis does say of the instruments used for cleaning the teeth that while such instruments are usually of steel, those made use of for the King and the Princes are of gold—"and if there had been a still more precious metal it would have been used for them, because they pay magnificently". Let all dentists, especially "scalers", take notice!

Dionis, *Cours d'Opérations de Chirurgie*, Paris, edit., 1714, pp. 512, 519.

Charles-Arnault Forgeron, dentist of King Louis Quatorze with the title "Surgeon-Operator for the Teeth", had an annual salary of 2,295 livres (about equivalent to \$7,000 at the present time), he filled the same office for the Dauphin and Dauphiness, receiving 1,500 livres (say \$5,500 of present time value). His duty was to clean and cut the teeth and to furnish roots and opiates when the King washed out his mouth. Trabouillet. *État de la France pour 1712*, vol. 1, p. 178. The King had an opening in his upper jaw through which every time he drank or gargled the water was carried into his nose; the hole was made by a shattering of the jaw drawn with the teeth—it became carious and sometimes ran caries with an evil odor. Dubois used no other remedy than the actual cautery with a red hot iron and effected a radical cure. *Journal de la Santé de Louis XIV*, pp. 162, 164, 294.

I have spoken of regulars—for there were regular dentists. The profession of surgeons, indeed, were advised not to draw teeth, especially those who used the lancet frequently. The celebrated Peter Dionis,²⁴ Surgeon-in-Ordinary to Maria Teresa, Queen of France, in his work on Surgery says of tooth pulling: "That operation consists only in the effort the wrist must make to pull the tooth; the effect is redoubled when the tooth resists and the operator does not loose hold till the tooth is extracted. That is why the Surgeons who have much bleeding practice and who wish to keep the hand light and firm, should never draw teeth for fear that the exertions they must make, should render the hand trembling; that work is to be left to operators who perform it daily and who have no other way of making a living"—which may be considered a blow beneath the belt for the primitive exodontist.

The learned author gives another reason: "If I advise the surgeon to abandon that operation, it is not solely by reason of the injurious effect on the hand, but also that seems to me to partake a little of the charlatan and mountebank. In fact most of these extractors abuse their ability in order to deceive the public, making believe that they need only their fingers or the point of a sword to extract the most firmly rooted teeth. But a surgeon should never recognize these tricks of dexterity; and as probity should be the rule in every action, he should keep himself aloof from those who wish to impose on others".

This indicates what the fact was, that very many extractors were quacks rather than surgeons; they became, indeed, so notorious for lying that there was a proverb: "Lies like a tooth-drawer".

The Pont-Neuf seems to have been one of their favourite stations; but they were seen at every Fair. One of the most celebrated tooth drawers was Jean Thomas, generally called Grand-Thomas; he had, indeed, studied surgery and been admitted Master and he practised with the licence of the Faculty. He was tall and stout, had the voice of a Stentor,

(The word which I translate "shattering" is *éclatement*: it is now obsolete and seems to have been used generally of outcry, etc.)

Louis Quatorze had bad teeth anyway; from 1685, thirty years before his death, he had hardly any in the upper jaw and those in the lower jaw were carious—when he had toothache, d'Aquin, his physician, used essence of cloves and of thyme; when an abscess formed, a cataplasm of bread crumbs was applied; if an operation seemed necessary, the Surgeon and Dentist were consulted and the Dentist operated. *op. cit.*, pp. 135, 140, 160.

²⁴Peter Dionis, born in Paris, was lecturer in surgery and anatomy in the Royal Gardens at Paris, an office founded by Louis Quatorze, which position he held till his death in 1718..

The work referred to in the Text is his *Cours d'opérations de Chirurgie démontrée, au jardin Royal de Paris*, Paris, 1707, which has been frequently reprinted and translated into nearly all the modern languages. He wrote a monograph on Epilepsy, was the first to emphasize the effects of rickets in the pelvis and had some part in advancing scientific dentistry. See *op. cit.*, p. 521.

wore a red coat trimmed with gold and a "bicorné" or two cornered hat adorned with peacock feathers. He has an enormous sword at his belt and was recognized from afar by his gigantic height and voluminous clothes; he stood on a steel car with four wheels and roared so loud that both sides of the Seine resounded. He had medicine for several diseases²⁵ but shone chiefly as an extractor of teeth. His star reached its zenith of glory in 1729 when the Queen of Louis Quinze, Marie Leszczyńska, daughter of the exiled King of Poland gave birth to a Dauphin.²⁶ He announced amid the general rejoicing that for fifteen days he would draw the teeth of every one presenting himself and that on Monday, September 19, he would give a grand open air banquet on the Pont-Neuf—the police cruelly stopped the banquet.

Although Dionis advised surgeons not to draw teeth, he did it himself sometimes; and this is how he set about it: "You make the patient whose tooth is to be extracted, sit upon the ground on a cushion (*carreau*); the operator places himself behind him and having caught his head between the two thighs, he raises it a little. The mouth of the patient being open, he takes note of the defective tooth so as not to take hold of one instead of the other; then after laying it bare, he separates the gum from that tooth which he then seizes with the instrument which seems to him most suitable. . . . When there is no failure, the patient spits out the tooth with the blood from the gum."

Dentistry made great strides in the 18th Century: the Kings, Queens, Princes and Princesses with many of the nobility had their own dentists, generally men of talent and education who were determined rather to save teeth than extract them. There were women dentists; but in 1755, women were forbidden the profession although Paris had only about thirty dentists in all. In 1768, regulations were made for admission as an Expert in the care of teeth.

But before this, there was much progress from the earlier practice. Filling with lead (*plombage*) and artificial teeth were not uncommon—it is said that Henry IV, Henry of Navarre, paid 20 sous a month for dentists' care of his teeth, and there is an account still extant for "gold to fill (*plomber*) the King's teeth".²⁷ But gold was not often used; Ambrose Paré recommends cork and lead, and the use of lead was so

²⁵Including one for syphilis described as "a radical cure for all the most characteristic of the secret diseases without keeping bed or room, by *Sieur Grand-Thomas*, formerly surgeon in the Royal Hospitals, tried under the eyes of Messrs. *Fermelhuys* and *Lemery*, doctors-regent in Medicine of the Faculty of Paris, without frication or salivation."

²⁶Louis, Dauphin of France, who married Marie Joseph of Saxony and by her became the father of the future Louis Seize; he died in the lifetime of his father and never became king.

²⁷The price was 15 liv. 15 sols, intrinsically about \$3.00, equivalent to \$60 now.

common as to give rise to the word "plombage" for filling generally. Prosthesis too, had, reappeared in the 16th century.

Paré advises "when they fall out, others should be fitted in, of bone or ivory or shark's teeth which are excellent for that purpose and which are to be tied to other neighboring teeth with gold or silver thread."²⁸

Nor were full sets of artificial teeth unknown; they were not very useful, indeed, being rather for show than for mastication. One Court lady, we are told, had a set of teeth of the seawolf (loup marin, *Labrax lupus*)—"She removed them when eating but she replaced them to speak more easily and that cleverly enough. At the table when others were talking, she removed her set of teeth and hurried to eat; then she replaced her set to unload her budget".²⁹ A satirical writer informs us in 1605 that "many . . . had artificial teeth which they removed before seating themselves at the table".³⁰ It would appear that the manufacture of false teeth was in the hands of the turners (tabletiers). Some of the practitioners claimed more success in their work. We are told of Catalan of the Rue Dauphiné, who "Will make you a complete set with which you will masticate all foods without discomfort and without effort". This was late in the 18th Century. At that time, it is said that ivory, human teeth, teeth of cattle and walrus were almost exclusively employed; and one practitioner advertised (in 1786) that he had discovered springs made of gold to hold as firmly as possible the artificial sets of teeth for mastication and talking. "These sets of teeth are shaped to imitate nature and to make all the movements of the mouth without being liable to break—they serve, especially, in the absence of natural teeth, for trituration of the food—that as is well

²⁸Ambrose Paré, born 1509 or 1510, died 1590, originally a barber, was in reality the father of modern surgery; he substituted ligature for boiling oil to close the arteries in amputations, and contended for the uselessness medicinally of mummy and unicorn's horn—he performed herniotomy for strangulated hernia and reprobated the practice of emasculation as a radical cure for hernia, he was the first since ancient times to employ the truss habitually, he recognized fracture of the neck of the femur and induration of the prostate, etc., etc.,—in short, it is not too much to say that he revolutionized surgery. He was Royal Physician to Henry II, Francis II and Charles IX; the story of his having been protected by the last named by being hidden under the Royal bed on the night of the St. Bartholomew Massacre is probably untrue as he was a Roman Catholic. The references are to his *Oeuvres*, 1573, pp. 612, 805.

²⁹Talleyrand des Reaux, *Historiettes*, vol. ii, p. 346, tells us this of Mlle. de Gournay, "la fille d'alliance" of Montaigne—the last sentence contains a delightful pun. "Râtelier" means either a "rack" or a "set of teeth"—"râtelée" means a "rakeful"; the lady is said to have replaced her râtelier to speak her râtelée—"elle remettoit son râtelier pour dire sa râtelée".

³⁰Artus d'Embry in his satirical work, *Description de l'Isle des Hermaphrodites*, Paris, 1505, p. 105.

known is the foundation of the whole animal economy".³¹ Even those in high station did not always have sets of teeth. Madame de Maintenon in 1714 writes: "I can scarcely see, I hear still worse and I am no longer understood because pronunciation is gone with the teeth".³²

The transplantation of teeth, the immediate replacement of a carious tooth by a sound human tooth, although doubted by Ambrose Paré, is said to have been successfully practised thirty years later, in 1615, by Dr. Louis Guyon—this, however, was again a century later doubted by Dionis.³³

Let us now leave this field and see what were the officinal medicines; for that end, we are not driven to conjecture, gossip or tradition.

Moses Charas in 1673 published at Paris his *Pharmacopoeia*, in 1753, of which Louis-Guillaume Lemonnier afterwards one of the Royal Physicians of Louis Quatorze, Louis Quinze and Louis Seize published at Lyons an improved edition in Latin and French which was translated into all the languages of Europe and even into Chinese. This is a perfect mine of lore pharmaceutical and undoubtedly reliable.³⁴

I gather from this Pharmacopée Royale some flowers of dental significance.

For tooth-ache, Agaric Troches are recommended: take two drachms of white ginger contused, four ounces of white wine, half a pound of choice agaric in powder—make troches according to the rules of the

³¹See Alf. Franklin *La Vie Privée d'Autrefois, Variétés Chirurgicales*, pp. 171, 172; *Affiches, Annonces et Avis Divers*, December 29, 1780, p. 201.

³²A. Geoffroy, *Madame de Maintenon d'après sa Correspondance*, vol. ij, p. 352.

³³Ambrose Paré, *Oeuvres*, p. 611. "That I have heard told but I have not seen it; and if it is true, it may well be"—which sounds like a truism.

Louis Guyon, *Le Mirour de la Beauté et Santé Corporelles*, Paris, 1615, p. 369.

Dionis, *Cours d'Opérations de Chirurgie*, 1714, p. 523.

These authors are, however, speaking more particularly of the immediate replacement in the alveolus of a tooth drawn in mistake for another.

³⁴Moïse (Moyse or Moses) Charas was born in Languedoc in 1618 and followed his profession as apothecary at Orange and later at Paris. Being a Calvinist, he was forced to leave France in 1680—he went to England then to Holland, then to Spain to attend Charles II. Disputing the contention of the Court physicians (firmly believed in by the Spanish people of the district) that the vipers for twelve miles around Toledo were harmless ever since they had been deprived of their poison by the fiat of a famous Archbishop, he fell into the hands of the Inquisition whence he escaped only by abjuring his Protestantism. He returned to Paris, 1690, where he lived until his death in 1698.

Monnier or Le Monnier or more correctly Lemonnier is known only by this work—he modestly hides his identity under initials, describing himself on the title page as "M. L. M. de l'académie Royale des Sciences et Docteur en Médecine de la Faculté de Paris". The work was published "avec approbation et privilege du roi", the Licence being dated seven years before publication, July 15, 1746. He was not yet Royal Physician. See Alfred Franklin's *La Vie Privée d'Autrefois: Les Médecins*, p. 169.

Art.³⁵ This was a wondrous medicine, good for stomach, kidneys, liver, spleen and uterus; it cured headache, pains in the eyes, ears and teeth—besides killing worms.

Cynoglossus Pills were very efficacious: take six drachms of choice myrrh, five drachms of the root of olibanum, half an ounce of each of dry cynoglossus root, seed of white hyoscyamus, and extract of opium, and an ounce and a half of each of saffron, castoreum and gum styrax.³⁶ These are much esteemed for fluxions from eyes, teeth, etc., and to facilitate slumber by allaying pains.

But the real thing for toothache is the Oil of St. John's wort, *Oleum hyperici*. Take two pounds of the top flowering leaves of St. John's wort approaching maturity, bruised, four pounds of olive oil, half a pound of generous wine, two pounds of Venice turpentine, three ounces of tincture of saffron.³⁷ This makes a balsam for pains in the joints, sciatica, gout and even for the toothache. That it heals all kinds of wounds (even those of the nerves), burns, etc., of course follows; but then "it is good also for worms and convulsions" when applied externally.

Then there were the *Pilulae sine Quibus*, Pills without which one should never be found. Take fourteen ounces of the extract of Socotrine aloes, prepared with the juice of white roses, six drachms of dacidium, half an ounce of each of the whitest agaric, choice rhubarb and cleaned senna leaves, a drachm of each of red roses without the stem, the tops of absinth, seed of violets, dodder and mastic. Make pills.³⁸ These pills are splendid purgatives, and "are strongly recommended in diseases of the head and particularly in those of the ears and eyes—they are taken fasting after the first sleep or in the morning".

Dentifrices were not unknown. Apparently there was not the variety we now enjoy; in fact I find only three, being *Pulvis Dentifricus*, Nos. 1, 2 and 3 respectively.

For *Pulvis Dentifricus*, No. 1, take one ounce of each of root of

³⁵R. *Zingiberis albi contusi*, drachm. ij. *Vini albi*, unc. iv. *Agarici electi in pulverem redacti*, libr. s. *Fiant ex arte trochisci*.

³⁶R. *Myrrhae electae* drachm. vj. *Olibani*, drachm. v. *Radici cynoglossi siccae*, *seminis hyoscyami albi*, *extracti opii*, ana, unc. s. *Croci*, *castorei*, *resinae stiracis*, ana, drachm. js.

³⁷R. *Summitatum hyperici floridarum*, ad maturitatem vergentium, *contusarum*, libr. ij. *Olei communis*, libr. iv. *Vini generosi*, libr. s. *Terebinthinae Venetae*, libr. ij. *Croci tincturae*, unc. iij.

Venetian Turpentine was not a turpentine but a compound of many drugs.

³⁸R. *Extracti aloes succotrinae cum succo rosarum pallidarum parati*, unc. xiv. *Dacidii*, drachm. vj. *Agarici albissimi*, *rhabarbari electi*, *foliorum senae mundatorum*, ana, unc. s. *Rosarum rubarum exungulatarum*, *summitatum absinthii*, *seminis violarum*, *cuscutae*, *mastiches*, ana, drachm. j. *Fiant pilulae*.

Florence iris (*i.e.*, orris root), pumice stone and stag's horn calcined, prepared red coral, sepia bones, and cream of tartar, all very finely pulverized; half a scruple of each of oriental musk and civet and two drops of each of distilled oils of rosewood, cloves and cinnamon—this may be mixed in a marble mortar with equal parts of syrup of mulberries and kermes to make a paste.³⁹

The author says "I know that there is no want of powders or pastes for cleansing and whitening the teeth; but I can assure you that this recipe is very good whether it be used in powder or in paste; for in addition to cleaning and whitening the teeth, it also prevents decay and stabilizes them."

Pulvis Dentifricus, No. 2 is simple: Take two ounces each of tears of dragon's blood and burnt common alum, finely pulverized; and four grains of oriental musk—this may also be made into a paste with the same syrup. "The use of this composition whether in powder or in paste is to rub the teeth gently evening and morning or even every hour if desired".⁴⁰

For Pulvis Dentifricus, No. 3, take half an ounce of each of calcined pumice stone, white coral, sepia bone and cream of tartar all prepared on a porphyry slab, and orris root finely pulverized; one drachm of sal ammoniac similarly pulverized, three grains of each of oriental musk, and ambergris⁴¹—"this powder is also very good for cleaning and whitening the teeth. It is used either in the state of powder or better mixed with syrup of coral or dry roses or rose-honey and then it is made into a paste before scrubbing the teeth". This rose honey, *Mel rosatum*,

³⁹R Radicis ireos Florentiae, lapidis pumicis et cornu cervi ustorum, coralli rubri praeparati, ossis interioris sepiae et cremoris tartari, tenuissime pulveratorum, ana, unc. j. Moschi orientalis zibethi, ana, scrup. s. Oleorum ligni rhodii, caryophyllorum et cinnamomi, ana, gutt. ij.

The root of the Florentine iris is our orris root; *Zibethum orientale* is from the civet and is so called to distinguish it from *zibethum occidentale*, *i.e.*, *stercus humanum*, from the superior animal. Kermes is the dried body of the female of a species of insect not unlike the cochineal, which grows on several species of oak in the basin of the Mediterranean; they were long thought to be berries. What the French call Kermes du nord or Kermes de racines are red berries; and there is a Kermes mineral; but the insect is here meant. The Rosewood here named is not our rosewood, but the odorous wood of two species of *Convolvulus* native in the Canary Isles, the famous English herbalist, Culpepper, recommends it to "encrease milk in nurses".

⁴⁰R Lachrymarum elegantium sanguinis draconis et aluminis romani usti, subtilissime pulveratorum, ana, unc. ij. Moschi orientalis, gran. lv.

⁴¹R Lapidis pumicis usti, coralli alni, ossis sepiae et cremoris tartari, supra porphyrium praeparatorum et radicis ireos Florentinae subtilissime pulveratae, ana, unc. s. Salis ammoniaci, similiter pulverati, drachm. j. Moschi orientalis et ambrae griseae, ana, gran. iij.

The "porphyry" or "porphyrium" was a porphyry slab used by apothecaries for pulverizing and mixing their drugs.

made of dried red rose leaves and very white honey was used by itself to clean and whiten the teeth. We may close our account of this work by extracting the formula for a balsam to promote the growth of the teeth in children; it is called the Balsamum ad puerorum dentitionem but there is no restriction of its use to *pueri*, boys; and no doubt it was equally beneficial to the dentition *puellarum*, of girls.

Take three ounces of unsalted May butter, two drachms of each of hen and duck fat; two ounces of each of the juice of river crabs, contused, extracted by cornflower water, also of mucilage of marsh mallow; four ounces of pulverized sugar candy; the yolk of an egg, and six grains of musk and of ambergris; mix and make a balsam.⁴² You crush two or three live river crabs in a marble mortar with a wooden pestle, moisten them with a little cornflower water and then press out two ounces of fluid; prepare two ounces of the mucilage of marsh mallow root, put the whole into a vessel of glazed earth with three ounces of May butter, two drachms of chicken fat and as much duck fat, cover the vessel and heat at a slow fire till the fluid almost disappears; then strain through linen, add (without fire) the yolk of an egg with the sugar candy, the musk and the ambergris finely powdered and the balsam is made.

It is a tried and approved preparation "for softening the gums of small children when their teeth are ready to come out; but the nurse should take care to anoint them with it often. Its use is very handy, for not being disagreeable to the children, it cannot hurt them if they swallow it".

Leave we the Old World and come to the New.

Nicholas Monardes, a Spanish physician, was born at Seville in 1493 the year after Columbus discovered America or at least Islands off America; Monardes did not visit America but he investigated the medicinal properties of American plants and other materials introduced from the New World. He published a book at Seville in Spanish, 1565, with the title *Dos Libros de las cosas que se traen de las Indias Occidentales que Serven al uso de Medecina*.—Two volumes concerning things brought from the West Indies which are used in Medicine. This work (after being reprinted in 1569 and 1580, a third volume being added in the last edition) was translated into Latin by Charles Clusius or L'Ecluse, and

⁴²R Butyri mayalis non saliti, unc. iij. Pinguedinis gallinae et anatis, ana, drach. ij. Succu cancrorum fluviatilium contusorum cum aqua florum cyani extracti et mucilaginis radice altheae, ana, unc. ij Sacchari candi subtiliter pulverati, unc. iv. Vitellum unum ovi. Moschi et ambrae griseae, ana, gran. vj. M. f. balsamum.

The *cyaneus* whose flowers are used in the *Centaurea cyaneus*, the common blue cornflower sometimes called the bachelor's button, blue bonnet or blue bottle; it grows very commonly in wheat and is often cultivated.

published in one volume at Antwerp, in 1574—this is the edition which I use.⁴³

I give the plants only which were used for the teeth; most of them had great efficacy also in the case of disease of the other parts.

The marvellous Tacamahaca from New Spain in addition to its other virtues, "allays tooth-ache when applied to the teeth even if they are decayed: and if the decayed tooth be burned (cauterized) it will prevent further decay".⁴⁴

The Caraña brought from the interior of the Continent by way of Cartagena and Nomen Dei cures everything that the Tacamahaca can cure and more quickly.⁴⁵

⁴³I owe to the kindness of Dr. J. H. Elliott of Toronto, the opportunity of examining this edition. The title is *De Simplicibus Medicamentis ex Occidentali India delatis, quorum in Medicina usus est. Auctore D. Nicolao Monardis Hispalensi Medico, Interprete Carolo Clusio, Atrebate Antverpiae, Ex Officina Christophoro Plantini, Architypographi Regii, M.D. LXXIII.*

The work was reprinted in Spanish in 1578 at Burgos, in Italian in 1585 at Venice, in Latin in 1579 and in French at Lyons in 1602 and 1629—the French being a translation of the Latin by Anthoine Colin, an apothecary of Lyons.

Monardes was a physician practising in his native city of Seville; he wrote on venesection, the bezoar stone, the use and properties of steel and of snow in medicine. His name is perpetuated by the botanical Monarda in Linnaeus' Class Diandria—we have several species in Canada. Charles Ecluse or L'Ecluse who Latinized his name to Carolus Clusius was an eminent botanist, born in Arras, France, 1526: after graduating, he travelled extensively, visiting England three times and also Vienna. In 1593, he became professor of botany at Leyden and continued in that position until his death in 1609. He had all kinds of physical suffering, fevers, dropsy, fracture of right arm and leg, dislocation at the age of 63 of his right thigh so that he became incapacitated from walking, calculus, colic, hernia—we are not told that he had toothache but it is likely he must have.

"Dolorem dentium sedat, dentibus, etiam corruptis, imposita: atque si hac dens corruptus ustuletur, prohibet ne corruptio longius serpat."

"Ustulo", "to burn, scorch", is rare in classical Latin; it sometimes means "to crisp the hair"; in mediaeval medicine, it meant burning with the "ustura" "fer chaud", actual cautery. "Ustura" was also one of the names given to the Carbuncle.

The Tacamahaca gum seems to be of different trees; the description given of the tree fits the Mexican tree *Bursera (Elaphrum) tomentosa*; but the gum came also from other Burseras and the kindred *Protinum*. The name Tacamahac is now generally applied to the Balsam-Poplar, *Populus balsamifera*.

⁴⁵Ad eosdem morbos laudatur quos Tacamahaca curare solet et minore tempore spacio vires suas exerit.

The Caraña or Caranna is from the *Bursera acuminata* of the Natural order Amyridaceae. Phillips, (1678-1706) says of it: "Caranna, a gum coming from the West Indies, good for the Tooth-ach if applied to the Temples", N.E.D. *sub voc.* "Carana".

The gum is described as like the Tacamahac but brighter, more fluid and heavier.

Then, there was Tobacco which a few years before that time, indeed, had been brought to Spain, "rather for the ornamentation of gardens, than because of its qualities; but now it is very much more noted for its qualities than its beauty". It would be impossible to enumerate all its wondrous medicinal virtues; but the enthusiastic author can say: "Not only does it terminate pain of the teeth arising from a frigid cause the tooth having first been rubbed with a piece of cloth soaked in its juice and a little pill made from its leaf having been inserted in it; but it also checks decay so that it creeps no further".⁴⁶

The fruit and other parts of a tree not named but described as being of the size of the Ilex or Scarlet Oak with bark like that of the Cerrus Aeglyops or Turkey Oak and leaves like the Ash are much praised. "The teeth are stabilized by the powder rubbed on them and receding gums are healed".⁴⁷

"Three years ago there was brought from Mechoacan Province, a certain root called Carlo Sancto, whose distinguished qualities they preach."

"This same plant when chewed helps receding gums and stabilizes the teeth: it also frees them from roughness and decay, and improves the breath; but after use, the mouth is to be washed out with wine to take away the bitter taste."⁴⁸

"A few days ago the Bishop of Cartagena brought from the mainland of the New World, the fruit of a tree from which dropped that tear which they call Dragon's Blood."

Amongst other qualities "it reunites recent wounds, it frees the gums from putrefaction and stabilizes the teeth."⁴⁹

⁴⁶*Dolores dentium a causa frigida non modò sinit dente prius deterso aliquo linteo eius delibuto, et pilula ex eius folio confecta denti indita, sed etiam ne corruptio serpat, prohibet.*

⁴⁷*Dentes eodem puluere fricati stabiliuntur, gingivae abscedentes sanantur.* This tree grows only in one Province and is described in a letter to Monardes by Petrus de Osma et Xarayzeio from Lima, Peru, December 26, 1568.

⁴⁸*Idem commanducatus, gingivis abscedentibus auxilio est, dentes stabilit, eosque a scabritia et corruptione liberat, orisque halitum commendat, sed postea vino os eluendum, ad amaritudinem tollendum.*

Dunglison, *Dictionary of Medical Science*, p. 175, says "Carlo Sancto Radix, St. Charles Root, found in Mechoachan. The bark is aromatic, bitter and acrid. It is considered to be sudorific and to strengthen the gums and stomach".

⁴⁹*Vulnera recentia glutinat, gingivas a putrefactione liberat et dentes stabilit,* "Glutino", properly "to glue", is the regular medical term for closing up or uniting a wound; it is used in this sense by Celsus who speaks of "glutinantia medicamenta", (VII, 4); and by Pliny who has "cicatracibus glutinandis", 32, 6, 35, par. 105—see also Celsus, VII, 27, 28; Pliny, 25, 5, 19, par. 43. The French, as Dr. Dunglison says, *Med. Dict., sub voc.* "Agglutinate", use the word "agglutiner" in the sense of "to reunite". He does not seem to be aware that the word "glutinate" was used in English in the same sense—cf. "glutination", "glutinative".

Dragon's Blood is well known in drug stores.

We can appreciate the great esteem in which the inhabitants of the Province of Quito held the teeth when we learn that "the inhabitants of this region are called Guancauilcas and are toothless, for they have a custom to draw their teeth which they offer up to their idols, saying that the best should be offered to them and nothing is more distinguished for a man, nothing more necessary, than the teeth."⁵⁰

Petrus de Osma et Xarayzeio writing to Monardes from Lima, December 26, 1568, expresses the fear that the Indians had sacrificed to their idols a boy of their race because he had disclosed to the Spaniards where to find Bezoar⁵¹ stones, for "the Indians hold these stones as very

⁵⁰Guancauilcas vocantur eius regionis incolae et edentuli sunt, quoniam pro mori habent vt sibi dentes eximant, quos, suis idolis offerant, dicentes optima quaeque eis offerri debere hominem autem nihil praestantius, nihil magis necessarium dentibus habere. I fancy all will agree on this estimate of the value of teeth—even if they would prefer to keep them in their mouth rather than lay them on the altar.

⁵¹Bezoar stones are stones, calculi, found in the stomach of certain goats or deer—in America of other ruminants—they had a great name as a cureall though practically inert—they do not differ in origin from those sometimes found in the cow.

Petrus de Osma et Xarayzeio in his letter to Monardes tells of a hunt he had taken part in in June, 1568, for animals with the Bezoar stone. I translate somewhat freely:

"The form of the animal from which the Bezoar stone is obtained you have described in your book. Having made diligent enquiry we found a certain kind of animal frequenting these mountains very similar to the goats—except that they are without horns—which you say are found in East India. They are reddish in colour for the most part and feed on healthgiving plants (of which there is great plenty in the mountains where these animals feed), and are so fleet that we could get them only by gunshot.

On the 25th of the present month of June, 1568, I with some friends went out to hunt on the mountains of this region: we were five days hunting and killed some of these animals of which I have spoken: as we had undertaken the hunt for them, we carried along your book.

Having made a large opening we found no stone, even in those of advanced age either in the stomach or in any other part of the body; from which we inferred that they were not similar to the (East) Indian animals. The Indians whom we had taken with us as servants being closely questioned in what part of the body these animals had the stones said that they knew nothing about such stones (as they were most hostile to us and did not wish to disclose their secrets to us). But an Indian lad ten or twelve years old, when he saw us so anxious for this information showed us a certain receptaculum like a pouch in the animals, in which they received the devoured herbage and after it had been ruminated sent it into the stomach. The Indians wanted to kill the boy then and there because he had shown it to us: and afterwards when we were busy hunting, they caught him and as we learned sacrificed him. The Indians set a great value on these stones and are accustomed to offer them up at the shrines of their idols which they call *Guacas*—they also offer other their most precious possessions as gold, silver, gems, necklaces, animals and boys.

It is a matter for astonishment that this animal is not found in all these Indies except in these mountains of Peru. For I have travelled the whole Kingdom of Mexico, all the Provinces and Kingdoms of Peru and many other regions of the West Indies, and I have never seen these animals except in the mountains of the Kingdom of Peru. . . .

valuable and offer them at the shrines of their Idols which they call Guacas and they are accustomed to offer up other very valuable things such as gold, silver, gems, necklaces, animals and boys".⁵²

Perhaps the modern dentist has now heard enough of these old-time teeth; but I cannot refrain from adding something of the wonderful qualities of Guayacan,—our Guaiacum.

Its use in the treatment of the Morbus Gallicus is well known; but its other virtues seem to have been obscured by time—anyway, Monardes tells us that "it stabilizes the teeth and whitens them if they are quite frequently washed with it", *i.e.*, with the infusion or tincture.⁵³

And now I must and will stop.

We took nine stones out of the pouch of the first animal we opened; they seemed to be created by the bounty of nature from the juice of these health bearing herbs, which collect in that pouch. We opened also other animals which we killed, in all of which we found stones, more or fewer according to the age. It is to be observed, too, that only the animals which feed on the mountains produce these very valuable stones; for those which take food in the plains, as they eat herbs less salubrious, so the stones in them, useful as they are, are not equal in efficacy to those which are found in animals feeding upon the mountains."

The animals are now known as llamas. The stones were believed to be valuable in all cases of poisoning, in all affections of the heart and to expel intestinal worms; they were a prophylactic against poisoned arrows and admirable in dressing wounds—all imaginary of course, even the vermifuge.

⁵²Indi eos lapides magno habent in precio, eosque in Idolorum suorum delubris, quae *Guacas* vocant et alia etiam preciosissima quaeque offerre solent veluti aurum, argentum, gemmas, monilia, animalia et pueros.

⁵³Dentes etiam confirmat et dealbat si saepius ea colluantur.

The method of preparing the tincture or infusion is most elaborately described.

SUPPLEMENTARY NOTE

It may be interesting to give Celsus' observations on the Teeth—they are to be found in Book VII, cap. XII, sec. 1 of his *De Rê Medicâ*: In cap. XI, he speaks of certain diseases of the Mouth and in cap. XII he proceeds:

"In the mouth there are also some diseases to be cured manually—in the first place sometimes teeth are loose, whether on account of the weakness of the roots or of the defect by the gums drying up. In either case a hot iron should be applied to the gums touching them lightly, not keeping it on. The cauterized gums should be anointed with honey and washed with mead. When the ulcers begin to be clean, drying medicaments are to be applied of the repressive kind.

If, however, toothache appears and it is determined to remove the tooth because medicaments are of no avail, it should be shaved around so that the gum separates from it—then it is to be shaken. This is to be continued until it is easily moved, for to extract an adherent tooth is attended with great danger and sometimes the jaw is displaced. It is even more dangerous in the upper jaw because it may concuss the temples and eyes. There the tooth is to be taken hold of by the hand if possible, if not, by the forceps (forfice) and if it is corroded, the cavity is previously to be filled with lint or well fitted lead so that it will not break under the forceps. The forceps must be drawn straight up lest the root being inclined the fragile bone in which the tooth is fixed be broken, one side or the other; consequently danger is never absent in the operation at all events in the case of short teeth which have roots almost longer. For often where the forceps cannot seize the tooth or does seize it without effect, it seizes and breaks the bone of the gum. Where there is an excess of hæmorrhage, one may know that something has been broken off the bone. Accordingly the shell should be examined with the probe (speculum) and drawn with the forceps (vulsella). If this is unsuccessful the gum should be incised until the loose shell of the bone is seized.

If this is not done at once, the jaw hardens externally, so that it is not possible to open the mouth. A hot cataplasm of flour and fig should be applied until pus is excited, then the gum should be incised.

It is to be noted that pus flows profusely from a broken bone—so that even then it is proper to extract—sometimes indeed, from an injury of this kind a fistula makes its appearance which must be got rid of.

A scabrous tooth of which part is black is to be scraped and anointed with roseleaves powdered to which a fourth part of gall-nut and another of myrrh are added. Sour wine is to be held in the mouth frequently, the head is to be covered, much walking, exercise and friction of the head had, while acrid food is not to be used.

If any teeth are loose from a blow or other accident, they are to be tied to others which hold fast, repressives are to be held in the mouth, such as wine in which pomegranate rind has been boiled or into which hot gall-nuts have been thrown.

If, again, in children one tooth grows out before that which should fall first, has disappeared, it should be drawn clean out: while the one which is produced in place of the former, should be pressed daily with the finger till it arrives at the proper size.

Whenever the root is left after the tooth is drawn, it should be extracted with that kind of forceps, the Greks call *rhizagra*" (that is, the 'Punch' formerly used for extracting roots of teeth).

About the last place one would expect to find any tooth remedies is a treatise on Vipers. But in the very celebrated work of Marcus Aurelius Severinus, *Vipera Pythia* . . . *De Natura Veneno Medecina Demonstrationes et Experimenta Nova* published at Padua, 1651, I read: "Conrad Tigurinus in his work on Serpents adds that the application of a viper's tooth elides toothache: also Pliny in Lib. 30, Cap. 5, alleges dentition

to be promoted by vipers' teeth being attached to the infant. So Ponsettus believes pain in the teeth of adults to be relieved by tying the upper teeth of the enhydrys to the upper teeth of the patient, the lower to the lower. Moreover to scarify the aching teeth of men, around with the largest tooth of the male white enhydrys will effect a cure", p. 359.

The word "enhydrys" is properly "enhydis", literally transliterated from the Greek. Herodotus uses "enhydis" of the otter; lib. ii, 72; iv, 109; but others use the word of the watersnake. Pliny is the only classical Latin writer who has the word at all—he employs it for the watersnake.

In his *Naturalis Historia*, lib. xxx, c. 3, 8, he says: "Moreover, for pains of the teeth some say the ashes of the heads without the flesh of dogs that have died of rabies is a sovereign remedy, dropped with cyprus-oil into the ear on the side of the aching teeth. The largest, left tooth of a dog, the aching tooth being circumscribed; or the bone from the back of a dragon (draco) or of an enhydis—this is a male white serpent—they circumscribify with the largest tooth of this—they rinse the canine teeth with wine reduced to half its volume by boiling. The teeth are scarified with the bones of the lizard (lacerta) taken from its forehead in the full of the moon so that they do not touch the ground . . . the ash of dogs applied with honey assists the slow dentition of children; a dentifrice is made in the same way. For hollow teeth the ash of mouse dung is inserted or the dried liver of lizards. If the heart of a snake is eaten or even applied it is considered effective. There are some who direct to eat a mouse twice a month and so avoid aches. Earthworms boiled in oil and dropped into the ear on the side the toothache is give relief—the ash of the same applied to corroded teeth makes them fall out easily: applied as an unguent it helps aching sound teeth—it should be burned in an earthenware vessel (testa). It is advantageous too to wash the teeth with a decoction of mulberry root in squill-vinegar. Then that little worm which is found in the plant called Venus' Lip inserted in the cavities of teeth is very helpful . . . and bugs from the mallow are dropped into the ears with oil of roses. The fine sand which is found in snail-shells inserted in the cavities of teeth, stops the pain immediately. The ash of empty snail-shells with myrrh helps the gums—the ash of a serpent burnt with salt in a jar along with oil of rose (is) dropped into the ear on the opposite side. The cast off skin of a snake heated with oil and pine-tar is dropped into either ear; some add frankincense and rose-oil. This same preparation inserted in the cavities make the teeth come out without difficulty. I myself think it idle to speak of white snakes sloughing this membrane at the time of the rising of the Dog Star as that does not happen in Italy and it is much less credible that in warm regions this sloughing is delayed so late, and indeed the cast-off skin aged with wax they say draw the teeth quickly. And the tooth of snakes bound on mitigates the pain. There are some who believe that the spider caught with the left hand and ground with rose oil dropped into the ear on the same side is valuable" (The words I translate "spider" are "araneum animal ipsum": they may mean "the shrewmouse"). . . .

"They say that the taste in the mouth is improved if the teeth are rubbed with mouse-ash mixed with honey: some mix the roots of fennel. If the teeth are scraped with a vulture feather, the breath is made sour—while to do the same with a porcupine quill tends to firmness. . . ."

Pliny in another passage, *Nat. Hist.*, lib. xxxii, c. 7, 26, says:

"Toothache is relieved by the gums being scarified with the bones of the sea-dragon: the decoction of the brain of a puppy (canicula) in oil, and applied so that the teeth are washed with it once a year. Moreover to scarify the gums with the root of parsnip is very useful in toothache. That is triturated and anointed with white hellebore and it extracts the teeth without trouble. The ash of salt fish burned in an earthen vessel

added to powdered marble is among the remedies: and old tunny fish burned in a new vessel, then tritured is excellent for toothache. They say that the backbones of all kinds of salt fish burned tritured and unguented are equally beneficial—and frogs are to be boiled one in a half pint (hemina) of vinegar, the teeth washed with the fluid and the fluid kept in the mouth. If squeamishness is an obstacle, Sallustius Dionysius used to hang them up by the hind legs so that the virus would flow out of their mouths into hot vinegar—that he would do with many frogs—he gave frogs to those of stronger stomachs to eat with the broth. They believe that the maxillary teeth (the molars) are particularly healed in this way and loose ones to be made firm by the said vinegar. For that purpose some macerate the bodies of two frogs, the legs being cut off, in half-a-pint of wine dried, the loose teeth to be washed with it. Others attach all of them to the maxillary—others again make a decoction of ten in three quarts of vinegar boiled down to a third, to stabilize the loose teeth. Then, too, the hearts of thirty-six frogs are decocted in a quart of oil under a potlid (*i.e.*, in a covered pot) that this may be poured into the ear, for an aching jaw. Others apply to the teeth the liver of a frog decocted and tritured with honey. All the above is more efficacious if marine frogs are used. If they are carious and fetid they throw a hundred of them into an oven to be dried during the night; then a sufficient quantity of salt is added and this is used for rubbing. The enhydrys is a snake living in water and so called by the Greeks. They scarify the gums with four upper teeth of this snake in pains of the upper teeth, with the lower in pains of the lower—some are content with the canine tooth of them. They use too, the ash of crabs; and the ash of mice is a dentifrice."

Sextus Plato, *De Cane*, ix, 24, says:—"For tooth ache burn the tooth of a dog, decoct the ash in half a pint of wine, and gargle with it—a cure will be effected". In the same work, ix, 26, he says:—"That the teeth may grow without pain, burn the tooth of a dog, triturate with honey and rub the gums firmly".

Habderrahmanus Aegyptius is said to have directed:—"What is called the canine tooth of a dog appended to the neck of a child whose teeth have not yet appeared, makes their eruption easy without any pain or injury". Delphin Ed. Pliny, *Nat. Hist.*, vol. vii, p. 4,080 note(d).

Quintus Serenus, c. 15, p. 314, says: "If by any chance you complain of corroded teeth burn mouse dung and put it into the gaping openings—the powder of earthworms roasted is also helpful". Marcellus Empiricus, Plinius Valerianus, Galen and others agree in this.

Marcus Aurelius Severinus was born in Calabria in 1580 and died at Naples in 1656—he was first a lawyer then a medical man; he was fond of trepanning and the actual cautery and was one of the first to describe diphtheria. His fame was so great as a professor of medicine as to attract a large number of students to Naples—he was a daring and harsh operator.

"Finally and in conclusion" the celebrated Franciscan Friar, mathematician and botanist of note, Louis Feuillée, in his sumptuous quarto published in Paris, 1725, *Journal des Observations Physiques, Mathématiques et Botaniques*, of what he saw in Chili and Peru, tells us of two plants used by the Natives dentally.

Chala Origani folio. "The natives of this country (Chili) use this plant in severe toothache, washing the mouth with a decoction."

Geranium Columbinum perenne flore purpureo, Vulgo *Core-Core*.

"This plant is admirable for relieving pains of the teeth: the Indians have the root boiled in ordinary water and when they have toothache, they rinse the mouth with it and feel themselves relieved at once; it also has the property of hardening the gums: that is the reason that those of advanced age make great use of it.

I almost forgot our own Samuel Thomson, the founder of the last formal system of

Medicine, the Thomsonian or Botanical School, which had great vogue in the second quarter of the last century and is not quite dead yet though I believe it no longer has a College. Thomson with all his fondness for Lobelia and Capsicum had his own share of good sound "horse sense" and if he did not cure many he saved many from being killed *secundum artem* by the Regulars.

For toothache, Thomson, or at least his followers, (for the copy of his little book in my possession printed at Hamilton, Canada West, in 1833, is silent on the matter) advised to "chew the Xanthoxylum or Tooth bark; a piece the size of the finger nail is sufficient at a time. Repeat till the pain ceases—as effectual as anything of the stimulating kind or No. 6 put in the tooth". Thomson's No. 6 was about the same as Tr. Myrrh. Co., and contained Myrrh, Capsicum and Alcohol, sometimes Camphor and Turpentine. Thomson gives an excellent and cheap dentifrice: "Bayberry or Candleberry . . . is good as tooth powder, clenses the teeth and gums and removes the scurvy, taken as snuff it clears the head and relieves the head-ache. It may be given to advantage in a relax and all disorders of the bowels. When the stomach is very foul, it will frequently operate as an emetic. For a dose take a teaspoonful (*i.e.*, of the roots dried and powdered) in hot water sweetened". Bayberry is *Myrica cerifera*.





TEETH IN OLDEN TIMES

THE HONORABLE WILLIAM RENWICK
RIDDELL, LL.D.,
TORONTO, CANADA

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TEETH IN OLDEN TIMES*

THE HON. WILLIAM RENWICK RIDDELL, LL.D.

Toronto, Canada

Within historical times there never has been a period in which the teeth have not been an object of care and an occasion of pride.

Artificial teeth have been found in Egyptian mummies—the lady of King Tut's time and country had her beautiful store teeth as well as her lipstick and perfumery quite on a par with our modern flapper—indeed the only thing in which the modern Canadian can crow over her ancient Egyptian sister is in her bobbed hair. The hard boiled historian of medicine says of these old artificial teeth that they are “an evidence that dentistry and dentists are at all events as old as the coquetry for which Egyptian women were notorious” (1).

In Ancient Greece, we find the *odontogluphon* corresponding to the Latin *dentiscalpium* which the lexicographers solemnly define: “*quo ea quae dentibus inhaerent eximuntur*,” i. e., an instrument by which that which sticks in the teeth is taken out—Anglicé, a toothpick. Then there are *odontotrimma*, a dentifrice or powder for scrubbing the teeth and gums; and *apodontosis*, abstersion of the filth around the teeth. The torture of toothache is not lacking, that was *odontalgia*—or the forceps for drawing teeth, *odontagra* or *odontaggon*, called by the Romans, *dentiducum*, a celebrated one being of lead. The man without teeth was *anodous*, or *nodos*; he with white teeth, *argiodous*, or *argiodon*; if his teeth were rough, serrate, etc., he was *karcharadous*; and if he had a jaw with only one tooth, that is, with the teeth grown together, he was *monodous*, like the son of Prusias, King of Bithynia, “who had one bone in the

*Read before the Academy of Dentistry, Toronto.

place of teeth," says Festus; or Pyrrhus, King of Epirus, "who is said to have had teeth grown together." One with prominent teeth was *proodous* and one who fought with them was *odontomaches*. I do not find any specific name, however, given to dentists: although Herodotus does mention physicians for the teeth.

No one can peruse the long list of compounds of the word *odous* in Greek (2) without appreciating the high regard which that marvellous people had for their teeth and the great care they took of them. Cicero, indeed, tells us that the third *Æsculapius* was the first—"so they say"—to discover toothdrawing (3). But the practice was not approved unless absolutely necessary: three hundred years before Christ the aphorism already had vogue, "don't pull, cure": and it was almost a binding rule never to extract teeth unless they were so loose as almost to come out by themselves (4). The celebrated Erasistrates whose most marked characteristic was aversion from blood-letting recommended that forceps should be made of lead so that no tooth should be drawn that was not so loose and wobbly that it could be drawn by lead forceps, that is without any force or violence—one rather wonders what he would have said to the diabolical turnkey which every doctor had half a century ago. Forceps of lead were openly displayed in the Temple of Apollo, the God of Healing (5).

Hippocrates, the father of medicine, advises that in toothache where the tooth is carious and loose, it should be extracted, but if the tooth aches without being carious or loose, it should be burned (6)—this was done by passing a red hot iron lightly and rapidly over the gum. Hippocrates never extracted unless it was absolutely necessary.

When we reach Rome we are on pretty firm ground: it does not seem to be certain when and where artificial teeth were invented: but by the times of Martial (A.D. 43-104) they were certainly in use. The satirist, addressing an old girl, Galla, after gibing her for wearing a wig and using paint, says—

"and at night, lay aside your teeth like your silks"
(7).

The same satirist indicates that a whole set of teeth made of bone or ivory could be procured. Addressing Fidentinus, who aspired to be considered a poet, Martial asks:

"So, Fidentinus, you wish to be considered a poet by means of our verses and hope to be believed? That's the way Aegle seems to herself to have teeth, bone ones bought or of Indian ivory—that's the way the painted Lycoris who is blacker than a falling mulberry seems to herself to be all right—and you by the same logic as that by which you make yourself out a poet, will have long hair when you are bald"
(8).

These sets of teeth were bound together by gold wire and in some way attached to the gums (9).

Celsus who lived about the beginning of the Christian era at Rome, and who was an authority in medicine almost to our own times, was of much the same opinion as Hippocrates not to pull a tooth unless it was too wobbly, but to burn the gum—he advised to fix the loose teeth and tie them to their neighbors with gold wire (10). Celsus has a good deal about teeth; he advised bursting hollow teeth by peppercorns pressed into them, and seems to have been well acquainted with the results of extraction in cases of ankylosis of the teeth and alveoli, caries and necrosis; his plan was to shake the tooth loose, most painfully, before applying the forceps (11)—not quite our modern local anesthesia.

It would be wearisome even were it possible to trace the progress—generally downward—of the science of the teeth through the Middle Ages—let us make a rest at the fourteenth century.

Much of the knowledge and skill of the Romans was lost but there undoubtedly were dentists—of a sort. So far as can be made out, they seem to have been mostly employed in drawing teeth but toward the end of that century we find a remedy for toothache, a gargle with a decoction of sage leaves (12).

François I who came to the throne in 1515 had a dentist (13), so far as I can find the first royal dentist named as such—his Royal Physician Dr. Jean Goeurot paid much attention to the teeth and had a crowd of remedies for toothache which he characterized as the most annoying of all sufferings. He recommended to hold in the mouth camphor water or a decoction of camphor in vinegar, and to put in a carious tooth, a little cotton soaked in the oil of spikenard, and to gargle with a decoction of camomile, mint and rue in hot wine.

For cleaning the teeth, the base of all the preparations was deers' horn.

About the same time Erasmus in his *Civilité* published in 1530, tells us that many different powders were used for that purpose; some rubbed the teeth with salt and alum and "many persons had the strange custom of cleaning the teeth with their own urine" (14). Laurent Joubert, Royal Physician to Henry III, preferred to this, wine diluted with water: and most will agree with him (15).

The cures for toothache were endless. Brantôme tells us that the Queen of Spain had sent him when he had the toothache, "a very singular herb—when he took it and held it in the hollow of his hand, the pain suddenly ceased" (16)—the same phenomenon has been known to appear in modern times on approaching a dentist's office or on the exhibition of forceps by the dentist. The marvellous herb was the dictamnus. Another used cotton soaked in oil, others pepper, cloves, sage, spikenard, poppy, mandrake, hyoscyamus—some applied to the temple a plaster of gum elemi (a stimulant gum obtained from various kinds of trees) with a little powder of cantharides: "It's a marvellous thing, the effect of this remedy," says the enthusiastic writer. Some advised bleeding: the celebrated Guy Patin writing June, 1661, says: "I had a severe toothache yesterday which compelled me to have myself bled on that side: the pain instantly ceased as by a kind of enchantment. I slept all night: this morning the pain returned a little: I had myself

bled on the other arm and was immediately cured" (17)—which looks like neuralgia.

Tobacco or snuff was also "a marvellous" remedy to relieve toothache.

As to caries, in addition to the excrements, fluid and solid, of the wild cat ("approved by two of the Regents of the Faculty of Medicine" in Paris (18)) there was used a vegetable essence whose composition is alas! concealed from us.

A certain Sieur Rebel in 1540 brought from Egypt "a water which destroyed toothache on the spot—it takes one by the nose and makes one weep abundant tears"—but a phial of four doses cost a louis d'or (19). As a louis d'or was worth intrinsically about four dollars and sixty cents, equivalent to some seventy dollars at the present time, it will be seen that the remedy was rather dear—but who with the toothache and the money would hesitate?

In the country we are told that a very favorite remedy was to rub the tooth with the tooth of a dead man (20).

Local anesthesia is not a new discovery. Writing in 1610, de Courval (21) tells us how a certain charlatan tooth drawer proceeded—he used no instrument but his two fingers, the thumb and the index finger, "before drawing the tooth which the patient wished removed he touched it with his two fingers on the point of one of which he, talking all the time, placed a little narcotic or stupefying powder, so as to put the part to sleep and make it insensible and without feeling. And on the other finger he put a powder marvellously caustic, which had so rapid an operation that in the very moment he made a cut or opening in the gum, it displaced and uprooted the tooth so that as soon as he touched it with his two fingers only he extracted it and sometimes it fell out without being touched." What these powders were we are not told; but the author assures us that it was impossible for any pain to appear "by reason of the said narcotic powder which was placed there at the same

time as the caustic, the one on one side of the gum and the other on the other"—*Credat Judaeus Apella*.

However, the author informs us: "It is an assured fact as I have heard said by persons of standing and trustworthy, that most of those whose teeth were drawn by this charlatan afterwards fell into great fluxions and catarrhs by reason of the attractions which had been excited in these parts by the said violent powders: And with some all the teeth fell out, so that having determined to have only one or two drawn, they were thunderstruck to find that they lost nearly all—a thing miserable and deplorable!"

Now, that man was a quack: but the regulars were not without their anesthetic—here is the formula:

Take two ounces of red roses, boil them for a day and a night in strong vinegar: then dry them: take enough and put on the tooth and it will fall out (22).

Here is another: Boil and then reduce to a cinder, earthworms: fill the hollow tooth with that powder and close it with wax. It will fall out (23).

I have spoken of regulars—for there were regular dentists. The profession of surgeons, indeed, were advised not to draw teeth, especially those who used the lancet frequently. The celebrated Peter Dionis (24), Surgeon-in-Ordinary to Maria Teresa, Queen of France, in his work on Surgery says of tooth pulling: "That operation consists only in the effort the wrist must make to pull the tooth: the effect is redoubled when the tooth resists and the operator does not loose hold till the tooth is extracted. That is why the surgeons who have much bleeding practice and who wish to keep the hand light and firm, should never draw teeth for fear that the exertions they must make should render the hand trembling: that work is to be left to operators who perform it daily and who have no other way of making a living"—which may be considered a blow beneath the belt for the primitive exodontist.

The learned author gives another reason: "If I advise the surgeon to abandon that operation, it is not solely by reason of the injurious effect on the

hand, but also that seems to me to partake a little of the charlatan and mountebank. In fact most of these extractors abuse their ability in order to deceive the public, making believe that they need only their fingers or the point of a sword to extract the most firmly rooted teeth. But a surgeon should never recognize these tricks of dexterity: and as probity should be the rule in every action, he should keep himself aloof from those who wish to impose on others."

This indicates what the fact was, that many extractors were quacks rather than surgeons; they became so notorious for lying that there was a saying: "Lies like a toothdrawer."

The Pont-Neuf seems to have been one of their favorite stations: but they were seen at every fair. One of the most celebrated tooth drawers was Jean Thomas, generally called Grand-Thomas: he had, indeed, studied surgery and been admitted Master and he practised with the license of the faculty. He was tall and stout, had the voice of a stentor, bore a red coat trimmed with gold and a *bicorne* or two cornered hat adorned with peacock feathers. He has an enormous sword at his belt and was recognized from afar by his gigantic height and voluminous clothes: he stood on a steel car with four wheels and roared so loud that both sides of the Seine resounded. He had medicine for several diseases (25) but shone chiefly as an extractor of teeth. His star reached its zenith of glory in 1729 when the Queen of Louis Quinze, Marie Leszezynska, daughter of the exiled King of Poland, gave birth to a Dauphin (26). He announced amid the general rejoicing that for fifteen days he would draw the teeth of every one presenting himself and that on Monday, September 19th, he would give a grand open air banquet on the Point-Neuf—the police cruelly stopped the banquet.

Although Dionis advised surgeons not to draw teeth, he did it himself sometimes; and this is how he set about it: "You make the patient whose tooth is to be extracted, sit upon the ground on a cushion

(*carreau*); the operator places himself behind him and having caught his head between the two thighs he raises it a little. The mouth of the patient being open, he takes note of the defective tooth so as not to take hold of one instead of the other; then after laying it bare, he separates the gum from that tooth which he then seizes with the instrument which seems to him most suitable. . . . When there is no failure, the patient spits out the tooth with the blood from the gum."

Dentistry made great strides in the eighteenth century: the kings, queens, princes, and princesses with many of the nobility had their own dentists, generally men of talent and education, who were determined rather to save teeth than extract them. There were women dentists; but in 1755 women were forbidden the profession, although at that time Paris had only about thirty dentists in all. In 1768 regulations were made for admission as an expert in the care of teeth.

But before this there was much progress from the earlier practice. Filling with lead (*plombage*) and artificial teeth were not uncommon—it is said that Henry IV, Henry of Navarre, paid twenty sous a month for dentists' care of his teeth, and there is an account still extant for "gold to fill (*plomber*) the King's teeth" (27). But gold was not often used: Ambrose Paré recommends cork and lead, and the use of lead was so common as to give rise to the word *plombage* for filling generally. Prosthesis, too, had reappeared in the sixteenth century.

Paré advises: "When they fall out, others should be fitted in, of bone or ivory or shark's teeth which are excellent for that purpose and which are to be tied to other and neighboring teeth with gold or silver thread" (28).

Nor were full sets of artificial teeth unknown: they were not extremely useful, indeed, being rather for show than for mastication. One Court lady, we are told, had a set of teeth of the seawolf (*loup marin*, *Labrax lupus*)—"She reinvoved them when

eating but she replaced them to speak more easily and that cleverly enough. At the table when others were talking, she removed her set of teeth and hurried to eat; then she replaced her set to unload her budget" (29). A satirical writer informs us in 1605 that "many . . . had artificial teeth which they removed before seating themselves at the table" (30). It would appear that the manufacture of false teeth was in the hands of the turners (tabletiers). Some of the practitioners claimed more success in their work. We are told of Catalan of the Rue Dauphine, who "Will make you a complete set with which you will masticate all foods without discomfort and without effort"—this was late in the eighteenth century. At that time it is said that ivory, human teeth, teeth of cattle and walrus were almost exclusively employed: and one practitioner advertised (in 1786) that he had discovered springs made of gold to hold as firmly as possible the artificial sets of teeth for mastication and talking. "These sets of teeth are shaped to imitate nature and to make all the movements of the mouth without being liable to break—they serve, especially in the absence of natural teeth, for trituration of the food—that, as is well known is the foundation of the whole animal economy" (31). Even those in high station did not always have sets of teeth—Madame de Maintenon in 1714 writes: "I can scarcely see, I hear still worse and I am no longer understood because pronunciation is gone with the teeth" (32).

The transplantation of teeth, the immediate replacement of a carious tooth by a sound human tooth, although doubted by Ambrose Paré, is said to have been successfully practised thirty years later, in 1615, by Dr. Louis Guyon—this, however, was again a century later doubted by Dionis (33).

Let us now leave this field and see what were the officinal medicines: for that end, we are not driven to conjecture, gossip or tradition.

Moses Charas in 1673 published at Paris his *Pharmacopæia*. In 1753 Louis-Guillaume Lemon-

nier, afterwards one of the Royal Physicians of Louis Quatorze, Louis Quinze and Louis Seize published at Lyons an improved edition in Latin and French which was translated into all the languages of Europe and even into Chinese. This is a perfect mine of lore pharmaceutical and is undoubtedly reliable (34).

I gather from this *Pharmacopée Royale* some flowers of dental significance.

For toothache, Agaric Troches are recommended: take two drachms of white ginger contused, four ounces of white wine, half a pound of choice agaric in powder—make troches according to the rules of the art (35). This was a wondrous medicine, good for stomach, kidneys, liver, spleen and uterus; it cured headache, pains in the eyes, ears and teeth—besides killing worms.

Cynoglossus pills were very efficacious: take six drachms of choice myrrh, five drachms of the root of olibanum, half an ounce of each of dry cynoglossus root, seed of white hyoscyamus, and extract of opium, and an ounce and a half of each of saffron, castoreum and gum styrax (36). These are much esteemed for fluxions from eyes, teeth, etc.; and to facilitate slumber by allaying pains.

But the real thing for toothache is the Oil of St. John's wort, *Oleum hyperici*—take two pounds of the top flowering leaves of St. John's wort approaching maturity, bruised, four pounds of olive oil, half a pound of generous wine, two pounds of Venice turpentine, three ounces of tincture of saffron (37). This makes a balsam for pains in the joints, for sciatica, gout and even for toothache. That it heals all kinds of wounds (even those of the nerves), burns, etc., of course follows: but then "it is good also for worms and convulsions" when applied externally.

Then there were the *Pilulae sine Quibus*, pills without which one should never be found. Take fourteen ounces of the extract of Socotrine aloes, prepared with the juice of white roses, six drachms of diacridium, half an ounce of each of the whitest agaric, choice rhubarb and cleaned senna leaves, a

drachm of each of red roses without the stem, the tops of absinth, seed of violets, dodder and mastic. Make pills (38). These pills are splendid purgatives and "are strongly recommended in diseases of the head and particularly in those of the ears and eyes; they are taken fasting after the first sleep or in the morning."

Dentifrices were not unknown. Apparently there was not the variety we now enjoy, in fact I find only three—being *Pulvis Dentifricus*, Nos. 1, 2 and 3 respectively.

For *Pulvis Dentifricus*, No. 1, take one ounce of each of root of Florence iris (i. e., orris root), pumice stone and stag's horn calcined, prepared red coral, sepia bones, and cream of tartar, all very finely pulverized; half a scruple of each of oriental musk and civet and two drops of each of distilled oils of rosewood, cloves and cinnamon—this may be mixed in a marble mortar with equal parts of syrup of mulberries and kermes to make a paste (39).

The author says, "I know that there is no want of powders or pastes for cleaning and whitening the teeth; but I can assure you that this recipe is very good whether it be used in powder or in paste; for in addition to cleaning and whitening the teeth, it also prevents decay and stabilizes them."

Pulvis Dentifricus, No. 2, is simple: Take two ounces each of tears of dragon's blood and burnt common alum, finely pulverized; and four grains of oriental musk—this may also be made into a paste with the same syrup. "The use of this composition whether in powder or in paste is to rub the teeth gently evening and morning or even every hour if desired" (40).

For *Pulvis Dentifricus*, No. 3, take half an ounce of each of calcined pumice stone, white coral, sepia bone and cream of tartar all prepared on a porphyry slab, and orris root finely pulverized; one drachm of sal ammoniac similarly pulverized, three grains of each of oriental musk, and ambergris (41), "this powder is also very good for cleaning and whitening

the teeth. It is used either in the state of powder or better, mixed with syrup of coral or dry roses or rose-honey and then it is made into a paste before scrubbing the teeth." This rose honey, *Mel rosatum*, made of dried red roseleaves and very white honey, was used by itself to clean and whiten the teeth. We may close our account of this work by extracting the formula for a balsam to promote the growth of the teeth in children; it is called the *Balsamum ad puerorum dentitionem* but there is no restriction of its use to *pueri*, boys; and no doubt it was equally beneficial to the dentition *puellarum*, of girls.

Take three ounces of unsalted May butter, two drachms of each of hen and duck fat; two ounces of each of the juice of river crabs, contused, extracted by cornflower water, and of mucilage of marsh mallow; four ounces of pulverized sugar candy; the yolk of an egg, and six grains of musk and of ambergris, mix and make a balsam (35). You crush two or three live river crabs in a marble mortar with a wooden pestle, moisten them with a little cornflower water and then press out two ounces of fluid; prepare two ounces of the mucilage of marsh mallow root, put the whole into a vessel of glazed earth with three ounces of May butter, two drachms of chicken fat and as much duck fat, cover the vessel and heat at a slow fire till the fluid almost disappears; then strain through linen, add (without fire) the yolk of an egg with the sugar candy, the musk and the ambergris finely powdered and the balsam is made (42).

It is a tried and approved preparation "for softening the gums of small children when their teeth are ready to come out; and the nurse should take care to anoint them with it often. Its use is very handy, for, not being disagreeable to the children, it cannot hurt them if they swallow it."

Leave we the Old World and come to the New.

Nicholas Monardes, a Spanish physician, was born at Seville in 1493, the year after Columbus discovered America or at least Islands off America: Monardes did not visit America but he investigated

the medicinal properties of American plants and other materials introduced from the New World. He published a book at Seville in Spanish, 1565, with the title *Dos Libros de las cosas que se traen de las Indias Occidentales que Serven al uso me Medecina*. (Two Volumes Concerning Things Brought from the West Indies Which are Used in Medicine). This work (after being reprinted in 1569 and 1580 a third volume being added in the last edition) was translated into Latin by Charles Clusius or L'Ecluse, and published in one volume at Antwerp in 1574—this is the edition which I use (43).

I give the plants only which were used for the teeth; most of them had great efficacy also in the case of disease of the other parts.

The marvellous Tacamahaca from New Spain in addition to its other virtues, "allays toothache when applied to the teeth even if they are decayed: and if the decayed tooth be burned (cauterized) it will prevent further decay" (44).

The Caraña brought from the interior of the Continent by way of Cartagena and Nomen Dei cures everything that the Tacamahaca can cure and more quickly (45).

Then there was tobacco which a few years before that time, indeed, had been brought to Spain, "rather for the ornamentation of gardens, than because of its qualities; but now it is very much more noted for its qualities than its beauty." It would be impossible to enumerate all its wondrous medicinal virtues, but the enthusiastic author can say: "Not only does it terminate pain of the teeth arising from a frigid cause the tooth having first been rubbed with a piece of cloth soaked in its juice and a little pill made from its leaf having been inserted in it; but it also checks decay so that it creeps no further" (46).

The fruit and other parts of a tree not named but described as being of the size of the ilex or scarlet oak with bark like that of the *Cerrus Aeglyops* or Turkey oak and leaves like the ash are much praised.

"The teeth are stabilized by the powder rubbed on them and receding gums are healed" (47).

"Three years ago there was brought from Mechoacan province a certain root called *carlo sancto*, whose distinguished qualities they preach."

"This same plant when chewed helps receding gums and stabilizes the teeth: it also frees them from roughness and decay, and improves the breath: but after use, the mouth is to be washed out with wine to take away the bitter taste" (48).

"A few days ago the Bishop of Cartagena brought from the mainland of the New World the fruit of a tree from which dropped that tear which they call dragon's blood."

Among other qualities "it reunites recent wounds, it frees the gums from putrefaction and stabilizes the teeth" (49).

We can appreciate the great esteem in which the inhabitants of the Province of Quito held the teeth when we learn that "the inhabitants of this region are called guancanilcas and are toothless, for they have a custom to draw their teeth which they offer up to their idols, saying that the best should be offered to them and nothing is more distinguished for a man, nothing more necessary, than the teeth" (50).

Petrus de Osma et Xarayzeio writing to Monardes from Lima, December 26, 1568, expresses the fear that the Indians had sacrificed to their idols a boy of their race because he had disclosed to the Spaniards where to find Bezoar (51) stones for "the Indians hold these stones as very valuable and offer them at the shrines of their idols which they call Guacas and they are accustomed to offer up other very valuable things such as gold, silver, gems, necklaces, animals and boys" (52).

Perhaps the modern dentist has now heard enough of these old time teeth: but I cannot refrain from adding something of the wonderful qualities of guayacan—our guaiacum.

Its use in the treatment of the *morbus gallicus* is well known: but its other virtues seem to have been

obscured by time—anyway, Monardes tells us that “it stabilizes the teeth and whitens them if they are quite frequently washed with it,” i. e., with the infusion or tincture (53).

NOTES

1. *Outlines of the History of Medicine*. . . . by Joh. Hermann Bass, M.D., Dr. Handerson's edition, N. Y., 1889, p. 15.

2. *odous*, genitive *odontos*, is, of course, Greek for a tooth. The compound of *odous* with references fill three folio columns of Stephanus' ponderous *Thesaurus*, vol. iii, coll. 3481 B-3484A.

3. Cicero, *De Naturâ Deorum*, Lib. iii, c. 22, enumerates three Aesculapii; the first was the son of Apollo and Coronis, “the bearded son of a beardless father” as the Greek wags called him; he discovered the *specillum*, the sound or probe for examining the depth of wounds, ulcers, &c., and was the first to bandage wounds. This is the God of Medicine. The second Aesculapius was struck by lightning and lies buried in Arcadia—the third, the son of Arsippus and Arsinoe *qui primus purgationem alvi, dentisque eculsionem, ut ferunt, invenit*—“who was the first, so they say, to discover purging and tooth extraction.” Cicero knew as much about such things as anybody—and that was not much.

4. After centuries of orgies of tooth pulling, and the sacrifice of millions of good serviceable teeth we are about back to the Greek idea. Dr. Box will save millions more—more power to his elbow!

5. We owe to Cælius Aurelianus (a celebrated Latin physician concerning whose period there is much uncertainty some placing him in the 1st century, A.D., and some as late as the 5th) the information that the lead forceps came from Erasistratus. See Cælius Aurelianus, *De Morbis Chronicis*, Haller's Edition, Lausan, 1774, Vol. ii, p. 135—the passage is part of Aurelianus' *Chronicles*, lib. ii, c. 4. The passage is given verbatim in Du Cange's *Glossarium Mediæ et Infimæ Latinitatis*, Vol. ij, p. 802, *sub voc.*, *Dentiducum*—I extract the substance: “*plumbum odontagogum . . . apud Delphes Apollinis templo ostentionis causa propositum quo demonstratione oportere eos dentes auferri, qui sint faciles, vel mobilitate laxati, vel quibus sufficiat plumbei ferramenti conamen ad summum.*”

The *dentiducum* for drawing teeth was also called *forfex dentaria* or in late Latin *dentaria*—“*ferrum unde Medici dentes tollunt.*”

Erasistratus of Iulis in Cos lived in the 3rd and 4th centuries, B.C., in Antioch and Alexandria. His most famous medical feat was the diagnosing of the puzzling illness of Antiochus, son of King Seleucus Nicator, as being love for

Stratonice his stepmother: he got a fee of one hundred talents (say one hundred thousand dollars). He rejected Hippocrates, discarded bleeding and purgation and was the prototype of Hahnemann in his theory of the powerful effects of the smallest doses of medicine: he invented a catheter and just missed discovering the circulation of the blood—had it not been for the old theory of *pneuma* he probably would have done so.

6. See Hippocrates, *Peri Pathon*: De affectionibus, Sec. 4. It should be said, however that there is much doubt whether Hippocrates really wrote this book—it will be found in Kuhn's useful edition, vol. ii, p. 380, Littré's splendid edition has this in vol. vi. p. 213.

I find in Hippocrates' celebrated *Aphorisms* only three references to the teeth. I translate.
Aph., iij, 25.

At the time of dentition there is pruritus of the gums, fevers, convulsions, diarrhea and particularly when they are producing canine teeth. . . .
Aph., v, 18.

Cold is harmful to the bones, teeth, nerves, cerebrum, spinal marrow; heat is beneficial.

Aph., iv, 53.

Fevers become more acute in those around whose teeth viscous matter forms.

7. Cum sis ipsa domi, mediaque ornere Suburra
Fiant absentes et tibi, Galla, comae;
Nec dentes aliter quam Serica, nocte reponas
Et jaceas centum condita pyxidibus
Nec tecum facies tua dormiat; innuis illo
Quod tibi prolatum est mane, supercilio

Martial, Epig, ix, 38.

"When you are at home, doctor yourself up with paint and powder, leave off the wig, too—lay aside at night your teeth no other wise than your silk garment and throw a hundred secret things in their boxes—and don't let your own face sleep with you—beckon with that eyebrow which is brought to you in the morning" (out of the box). The rest of this scurrilous Epigram, I do not copy even in the decent obscurity of a learned language—it is too vile for even the Delphin editors to paraphrase. The lady did not wear silk pyjamas—she, like all others till a few generations ago, lay "in naked bed."

Who Galla was does not appear: and the commentators do not help us—she seems to have been just "that d—Frenchwoman."

8. Nostris versibus esse te Poetam,
Fidentine, putas. cupisque credi?
Sic dentata sibi videtur Aegle

*Entis ossibus, Indicoque cornu:
Sic, quae nigrior est cadente moro
Cerussata sibi placet Lycoris.
Hac et tu ratione, quâ Poeta es,
Caleus cum fueris, eris comatus.*

Martial, Epig., lib. j, 73.

These Fidentinus, Aegle and Lycoris are all unknown to fame.

9. So says Cicero (or whoever was the author of *De Legibus*) lib. ij, c. 24.

10. *Auro cum iis qui bene haerent vincendi sunt*—"they are to be tied with gold to those which are holding fast." Celsus, *De Medicina*, lib. vij, c. 12 (1).

11. See as to Celsus, Bass, *op. cit.*, pp. 161, 162; he was the father of mediaeval medicine. Apparently the Hindus and Egyptians long before this time "attempted to replace lost teeth by attaching wood or ivory substitutes to an adjacent sound tooth by means of threads or wires; but the gold fillings reputed to have been found in the teeth of Egyptian mummies have . . . been shown to be superficial applications of gold leaf for ornamental purposes." *Encyclopædia Britannica*, 11th Ed. *sub voc.* Dentistry. Our colored brethren and sisters still have a fondness for gold teeth—a failing not wholly unknown in the white races.

12. Much of the information in this part of the paper is derived mediately or immediately from Alfred Franklin's entertaining series *La Vie Privée d'Autrefois*—Paris, 1894. There is no pretence here of originality, and I trust that this general acknowledgment may make it unnecessary to specialize. I have verified quotations and statements wherever possible. The "gargarisme" is given in *Le Menagier de Paris*, Paris, 1393, vol. ij, p. 25.

13. The Royal Dentist was Guillaume Coureil: Francis died of syphilis—but that is a matter of detail.

14. Within half a century I have known in Ontario a family of French Canadian origin use the same dentifrice: and I am assured by one who should know that this custom still prevails among the peasants of Normandy.

15. Laurent Houbert (1529-1583) was Chancellor of the famous medical school of Montpellier. It is said that of his work *Erreurs populaires au fait de la Médecine et Régime de Santé*, 6000 copies were sold in six months: his most revolutionary doctrine was that a foul smell was not conclusive evidence of putridity. He did not—as he might—cite our skunk!

16. See Brantôme's *Oeuvres*. (1740), Vol. viii, p. 13. Pierre de Brantôme (1540-1614) is a celebrated French chronicler.

17. A letter from Gui Patin to his friend and pupil Noël Falconet, June 19, 1661. Gui Patin (1601-1672) a French physician (and also wit and free thinker) a friend and pupil

of Riolanus, graduated M.D. in Paris, 1627, and practised in that city all his professional life, becoming Dean of the Faculty and Professor of Medicine. He was a determined enemy of antimony and chemical medicine generally. He was the first to note a case of tubal pregnancy, which he attributed to a straying of the ovum. A great scholar and humanitarian, his chief consolation on his death bed was that he would meet in the other world, Aristotle, Plato, Vergil, Cicero and his beloved Galen.

Noël Falconer (1644-1734) of Lyons was a pupil of Patin's but was of the opposite school, an Iatrochemist and a thoroughgoing follower of Sylvius.

18. So says the surgeon, B. Martin, in his *Dissertation sur les Dents*, Paris, 1679, p. 64.

19. N. de Blégny; *Le livre commode pour 1692*; vol i, p. 172, vol. ii, p. 178.

20. J. B. Thiers; *Traité des superstitions*, Paris, 1697, vol. i, p. 375.

21. Dr. Th. Sonnet de Courval; *Satyre contre les charlatans et pseudomédecins empyriques*, 1610; see pp. 107, sqq.

22. *Les secrets du Seigneur Alexis*: Paris 1691, p. 351. Seigneur Alexis was Girolamo Ruscelli, who died 1566.

23. Madame Fouquet; *Recueil de remèdes faciles et domestiques*, 1678, p. 73.

It may be of interest to note here that Dubois, the exodontist charged with drawing the teeth of Louis Quatorze, used for that purpose an *elevatoire* of new invention. We are not told of what material that instrument was made though Dionis praises it almost fulsomely. But Dionis does say of the instruments used for cleaning the teeth that while such instruments are usually of steel, those made use of for the King and the Princes are of gold—"and if there had been a still more precious metal it would have been used for them, because they pay magnificently." Let all dentists, and especially "scalers", take notice!

Dionis, *Cours d' Operations de Chirurgie*, Paris, edit., 1714, pp. 512, 519.

Charles-Arnault Forgeron, dentist of King Louis Quatorze with the title "Surgeon-Operator for the Teeth," had an annual salary of 2295 livres (about equivalent to seven thousand dollars at the present time); he filled the same office for the Dauphin and Dauphiness receiving one thousand five hundred livres (say five thousand five hundred dollars of present time value). His duty was to clean and cut the teeth and to furnish roots and opiates when the King washed out his mouth. Trabouillet, *Etat de la France pour 1712*, vol. i, p. 178. The King had an opening in his upper jaw through which every time he drank or gargled carried the water into his nose: the hole was made by a shattering of the jaw drawn with the teeth—it became carious and sometimes ran caries with an evil odor. Dubois used no other

remedy than the actual cautery with a red hot iron and effected a radical cure. *Journal de la Santé de Louis XIV*, pp. 162, 164, 294.

(The word which I translate "shattering" is *eclatement*; it is now obsolete and seems to have been used generally of outcry, &c.). Louis Quatorze had bad teeth anyway: from 1685, thirty years before his death, he had hardly any in the upper jaw and those in the lower jaw were carious—when he had toothache, d'Aquin, his physician, used essence of cloves and of thyme; when an abscess formed, a cataplasm of bread crumbs was applied; if an operation seemed necessary, the surgeon and dentist were consulted and the dentist operated. Op. cit., pp. 135, 140, 160.

24. Peter Dionis, born in Paris, was lecturer in surgery and anatomy in the Royal Gardens at Paris, an office founded by Louis Quatorze, which position he held till his death in 1718.

The work referred to in the text is his *Cours d'opérations de Chirurgie démontrée, au jardin Royal de Paris, Paris*, 1707, which has been frequently reprinted and translated into nearly all the modern languages. He wrote a monograph on *Epilepsy*, was the first to emphasize the effects of rickets in the pelvis and had some part in advancing scientific dentistry. See p. 521.

25. Including one for syphilis described as "a radical cure for all the most characteristic of the secret diseases without keeping bed or room, by Sieur Grand-Thomas, formerly surgeon in the Royal Hospital, tried under the eyes of Messrs. Fermelhuys and Lemery, doctors-regent in Medicine of the Faculty of Paris, without frication or salivation."

26. Louis, Dauphin of France, who married Marie Joseph of Saxony and by her became the father of the future Louis Seize: he died in the lifetime of his father and never became King.

27. The price was fifteen liv. fifteen sols, intrinsically about three dollars, equivalent to sixty dollars now.

28. Ambrose Paré, born 1509 or 1510, died 1590, originally a barber, was in reality the father of modern surgery; he substituted ligature for boiling oil to close the arteries in amputations, and contended for the uselessness medicinally of mummy and unicorn's horn—he performed herniotomy for strangulated hernia and reprobated the practice of emasculation as a radical cure for hernia, was the first since ancient times to employ the truss habitually, he recognized fracture of the neck of the femur and induration of the prostate, &c., &c.,—in short, it is not too much to say that he revolutionized surgery. He was Royal Physician to Henry II, Francis II, and Charles IX: the story of his having been protected by the last named by being hidden under the Royal bed on the night of the St. Bartholomew Massacre is proba-

bly untrue, as he was a Roman Catholic. The references are to his *Oeuvres*, 1573, pp. 612, 805.

29. Talleyrand des Reaux, *Historiettes*, vol. ii, p. 346, tells us this of Mlle. de Gournay, "*la fille d'alliance*" of Montaigne—the last sentence contains a delightful pun. *Râtelier* means either a rack or a "set of teeth"—*râtalée* means a rakeful; the lady is said to have replaced her *râtelier* to speak her *râtalée*—elle remettoit son *râtelier* pour dire sa *râtalée*."

30. Artus d' Embry in his satirical work, *Description de l'Isle des Hermaphrodites*, Paris, 1605, p. 105.

31. See Alf. Franklin. *La Vie Privée d'Autrefois, Variétés Chirurgicales*, pp. 171, 172., *Affiches, Annonces et Avis Divers*, December 29, 1780, p. 201.

32. A. Geoffroy, *Madame de Maintenon d'après sa Correspondance*, vol. ij, p. 352.

33. Ambrose Paré, *Oeuvres*, p. 611. "That I have heard told, but I have not seen it; and if it is true, it may well be"—which sounds like a truism.

Louis Guyon, *Le Mirour de la Beauté et Santé Corporelles*, Paris, 1615, p. 369.

Dionis, *Cours d'Opérations de Chirurgie*, 1714, p. 523.

Those authors are however speaking more particularly of the immediate replacement in the alveolus of a tooth drawn in mistake for another.

34. Moïse (Moyse or Moses) Charas was born in Languedoc in 1618 and followed his profession as apothecary at Orange and later at Paris. Being a Calvinist, he was forced to leave France in 1680—he went to England, then to Holland, then to Spain to attend Charles II. Disputing the contention of the Court physicians (firmly believed in by the Spanish people of the district) that the vipers for twelve miles around Toledo were harmless ever since they had been deprived of their poison by the fiat of a famous Archbishop, he fell into the hands of the inquisition, whence he escaped only by abjuring his Protestantism. He returned to Paris, 1690, where he lived until his death in 1698.

Monnier or Le Monnier or more correctly Lemonnier is known only by this work—he modestly hides his identity under initials describing himself on the title page as "M.L.M. de l'Académie Royale des Sciences et Docteur en Médecine de la Faculté de Paris." The work was published "*avec approbation et privilège du roi*," the license being dated seven years before publication, July 16, 1746. He was not yet Royal Physician. See Alfred Franklin's *La Vie Privée, Les Médecins*, p. 169.

35. \mathcal{R} *Zingiberis albi contusi, drachm. ij, Vini albi unc. iv. Agarici electi in pulverem redacti, libr. s. Fiant ex arte trochisci.* p. 277.

36. \mathcal{R} *Myrrhae electae drachm. vj, Olibani, drachm. v. Radicis cynoglossi siccae, seminis hyoscyami albi, extracti*

opii, ana, unc. s. Croci, castorei, resinæ stiracis, ana drachm. js.

37. *℞ Summitatum hyperici floridarum, ad maturitatem vergentium, contusarum, libr. ij. Olei communis, libr. iv. Vini generosi, libr. s. Terebinthina Venatae libr. ij. Croci tincturae, unc. iij.* Venetian Turpentine was not a turpentine but a compound of many drugs.

38. *℞ Extracti aloes soccotrinae cum succo rosarum pal-lidarum parati. unc. xiv. Diacridii, drachm. vj. Agarici albissimi, rhabarbari electi, foliorum senae mundatorum, ana unc. s. Rosarum rubarum exungularum, summitatum absinthii, seminis violarum, cuscuthæ, mastiches, ana, drachm. j. Fiant pilulæ.*

39. *℞ Radicis ircos Florentinae, lapidis pumicis et cornu cervi ustorum, coralli rubri præparati, ossis interioris sepiæ et cremoris tartari, tenuissime pulveratorum, ana, unc. j. Moschi orientalis zibethi, ana, scrup. s. oleorum ligni rhodii, caryophyllorum et cinnamomi, ana, gutt. ij.*

The root of the Florentine iris is our orris root; Zibethum orientale is from the civet and is so called to distinguish it from *zibethum occidentale*, i. e. *stercus humanum*, from the superior animal. Kermes is the dried body of the female of a species of insect not unlike the cochineal, which grows on several species of oak in the basin of the Mediterranean; they were long thought to be berries. What the French call *Kermes du nord* or *Kermes de racines* are red berries. And there is a Kermes mineral; but the insect is here meant. The rosewood here named is not our rosewood, but the odorous wood of two species of *Convolvulus*, native to the Canary Isles; the famous English herbalist Culpepper recommends it to "encrease milk in nurses."

40. *℞ Lachrymarum elegantium sanguinis draconis et aluminis romani usti, subtilissime pulveratorum, ana, unc. ij. Moschi orientalis, gran. lv.*

41. *℞ Lapidis pumicis usti, corodli alni, ossis sepiæ et cremoris tartari, supra porphyrium præparatorum et radicis ircos Florentinae subtilissime pulveratae, ana, unc. s. Salis ammoniaci similiter pulverati, drachm. j. Moschi orientalis et ambræ griseæ, ana, gran. iij.* The "porphyry" or "porphyrum" was a porphyry slab used by apothecaries for pulverizing and mixing their drugs.

42. *℞ Butyri mayalis non saliti, unc. iij. Pinguedinis gallinae et anatis, ana, drach. ij. Succu cancerorum fluxiatilium contuso um cum aqua florum cyani extracti et mucilaginis radice altheæ, ana unc. ij. Sacchari candi subtiliter pulverati, unc. iv. Vitellum unum ovi. Moschi et ambræ griseæ, ana, gran. vij. M. f. balsamum.*

The *cyaneus* whose flowers are used is the *Centaurea cyanus*, the common blue cornflower sometimes called the bachelor's button, blue bonnet or blue bottle; it grows very commonly in wheat and is often cultivated.

43. I owe to the kindness of Dr. J. H. Elliott of Toronto, the opportunity of examining this edition. The title is *De Simplicibus Medicamentis ex Occidentali India delatis. quorum in Medicina usus est. Auctore D. Nicolo Monardis Hispalensi Medico, Interprete Carolo clusio, Atrebate / Antverpiæ. Ex Officina Christophoro Plantim, Architypographi Regii, M.D. LXXIII.*

The work was reprinted in Spanish in 1578 at Burgos, in Italian in 1585 at Venice, in Latin in 1579 and in French at Lyons in 1602 and 1629, the French being a translation of the Latin by Anthoine Colin, an apothecary of Lyons.

Monardes was a physician practising in his native city of Seville; he wrote on venesection, the bezoar stone, the use and properties of steel and of snow in medicine. His name is perpetuated by the botanical Monarda in Linnaeus' Class Diandria—we have several species in Canada. Charles Ecluse or L'Ecluse, who Latinized his name to Carolus Clusius, was an eminent botanist, born in Arras, France, 1526; after graduating he travelled extensively, visiting England three times and also Vienna. In 1593, he became professor of botany at Leyden and continued in that position until his death in 1609. He had all kinds of physical suffering, fevers, dropsy, fracture of right arm and leg, dislocation at the age of sixty-three of his right thigh so that he became incapacitated from walking, calculus, colic, hernia—we are not told that he had toothache, but it is likely he must have.

44. *Dolorem dentium sedat, dentibus, etiam corruptis, imposita; atque si hac dens corruptus ustuletur, prohibet ne corruptio longius serpat.*

"Ustulo," "to burn, scorch," is rare in classical Latin; it sometimes means "to crisp the hair"; in mediaeval medicine, it meant burning with the "ustura" "fer chaud," actual cautery. "Ustura" was also one of the names given to the Carbuncle.

The Tacamahaca gum seems to be of different trees: the description given of the tree fits the Mexican tree *Bursera (Elaphrum) tomentosa*; but the gum came also from other *Burseras* and the kindred *Protinum*. The name Tacamahac is now generally applied to the Balsam-Poplar, *Populus balsamifera*.

45. *Ad eosdem morbos laudatur quos Tacamahaca curare solst et minore tempore spacio vires suas exerit.*

The Caraña or Caranna is from the *Bursera acuminata* of the Natural order, Amyridaceae. Phillips, (1678-1706), says of it: "Caranna. a gum coming from the West Indies, good for the Tooth-ach if applied to the Temples." N.E.D. *sub voc.* "Carana."

The gum is described as like the Tacamahac but brighter, more fluid and heavier.

46. *Dolores dentium a causa frigida non modò sinit dente prius detergo aliquo linteo eius delibuto, et pilula ex eius*

folio confecta denti indita, sed etiam ne corruptio serpat, prohibet.

47. *Dentes eodem pulveri fricati stabiliuntur, gingivae abscedentes sanantur.* This tree grows only in one Province and is described in a letter to Monardes by Petrus de Osma et Xarayzeio from Lima, Peru. December 26, 1568.

48. *Idem commanducatus, gingivis abscedentibus auxilio est, dentes stabilit, eosque a scabritia et corruptione liberat, orisque halitum commendat, sed postea vino os eluendum, ad amaritudinem tollendum.*

Dunglison, Dictionary of Medical Science, p. 175, says: "Carlo Sancto Radix, St. Charles Root, found in Mechoacan. The bark is aromatic, bitter and acrid. It is considered to be sudorific and to strengthen the gums and stomach."

49. *Vulnera recentia glutinat, gingivas a putrefactione liberat et dentes stabilit.* "Glutino," properly "to glue," is the regular medical term for closing up or uniting a wound; it is used in this sense by Celsus, who speaks of "*glutinantia medicamenta*" (VII, 4); and by Pliny, who has "*cicatracibus glutinandis*" 32, 6, 35, par. 105—see also Celsus, VII, 27, 28: Pliny, 25, 5, 19, par. 43. The French, as Dr. Dunglison says, Med. Dict., *sub voc.* "Agglutinate," use the word "agglutiner" in the sense of "to reunite." He does not seem to be aware that the word "glutinate" was used in English in the same sense—cf., "glutination," "glutinative."

Dragon's Blood is well known in drug stores.

50. *Guancauilcas vocantur eius regionis incolae et edentuli sunt, quoniam pro mori habent et sibi dentes eximant, quos, suis idolis offerant, dicentes optima quaeque eis offerri debere hominem autem nihil praestantius, nihil magis necessarium dentibus habere.* I fancy all will agree on this estimate of the value of teeth—even if they would prefer to keep them in their mouth rather than lay them on the altar.

51. Bezoar stones are stones, calculi, found in the stomach of certain goats or deer—in America of other ruminants—they had a great name as a cure all though practically inert—they do not differ in origin from those sometimes found in the cow.

Petrus de Osma et Xarayzeio in his letter to Monardes tells of a hunt he had taken part in in June, 1568, for animals with the Bezoar stone. I translate somewhat freely:

"The form of the animal from which the Bezoar stone is obtained you have described in your book. Having made diligent inquiry we found a certain kind of animal frequenting these mountains very similar to the goats—except that they are without horns—which you say are found in East India. They are reddish in color for the most part and feed on healthgiving plants (of which there is great plenty in the mountains where these animals feed), and are so fleet that we could get them only by gunshot.

On the 25th of the present month of June, 1568, I with

some friends went out to hunt on the mountains of this region: we were five days hunting and killed some of these animals of which I have spoken; as we had undertaken the hunt for them, we carried along your book.

Having made a large opening we found no stone, even in those of advanced age either in the stomach or in any other part of the body; from which we inferred that they were not similar to the (East) Indian animals. The Indians whom we had taken with us as servants being closely questioned in what part of the body these animals had the stones, said that they knew nothing about such stones (as they were most hostile to us and did not wish to disclose their secrets to us). But an Indian lad ten or twelve years old, when he saw us so anxious for this information showed us a certain receptaculum, like a pouch in the animals, in which they received the devoured herbage and after it had been ruminated sent it into the stomach. The Indians wanted to kill the boy then and there because he had shown it to us; and afterwards when we were busy hunting, they caught him and as we learned sacrificed him. The Indians set a great value on these stones and are accustomed to offer them up at the shrines of their idols which they call *Guacas*—they also offer other their most precious possessions as gold, silver, gems, necklaces, animals and boys.

It is a matter for astonishment that this animal is not found in all these Indies except in these mountains of Peru. For I have travelled the whole Kingdom of Mexico, all the Provinces and Kingdoms of Peru and many other regions of the West Indies, and I have never seen these animals except in the mountains of the Kingdom of Peru. . . .

We took nine stones out of the pouch of the first animal we opened; they seemed to be created by the bounty of nature from the juice of these health bearing herbs, which collects in that pouch. We opened also other animals which we killed, in all of which we found stones, more or fewer according to the age. It is to be observed, too, that only the animals which feed on the mountains produce these very valuable stones; for those which take food in the plains, as they eat herbs less salubrious, so the stones in them, useful as they are, are not equal in efficacy to those which are found in animals feeding upon the mountains."

The animals are now known as llamas. The stones were believed to be valuable in all cases of poisoning, in all affections of the heart and to expel intestinal worms; they were a prophylactic against poisoned arrows and admirable in dressing wounds—all imaginary, of course, even the vermifuge.

52. *Indi eos lapides magno habent in precio, eosque in Idolorum suorum delubris, quae Guacas vocant et alia etiam preciosissima quaeque offerre solent veluti aurum, argentum, gemmas, monilia, animalia et pueros.*

53. *Dentes etiam confirmat et dealbat si saepius ea ea colluantur.*

The method of preparing the tincture or infusion is most elaborately described.

SUPPLEMENTARY NOTE

It may be interesting to give Celsus' observations on the Teeth—they are to be found in Book VII, cap. XII, sec. 1 of his *De Rê Medicâ*. In cap. XI, he speaks of certain diseases of the Mouth and in cap. XII he proceeds:

"In the mouth there are also some diseases to be cured manually—in the first place sometimes teeth are loose, whether on account of the weakness of the roots or of the defect by the gums drying up. In either case a hot iron should be applied to the gums, touching them lightly, not keeping it on. The cauterized gums should be anointed with honey and washed with mead. When the ulcers begin to be clean, drying medicaments are to be applied of the repressive kind.

"If, however, toothache appears and it is determined to remove the tooth because medicaments are of no avail, it should be shaved around so that the gum separates from it—then it is to be shaken. This is to be continued until it is easily moved, for to extract an adherent tooth is attended with great danger and sometimes the jaw is displaced. It is even more dangerous in the upper jaw because it may concussion the temples and eyes. Then the tooth is to be taken hold of by the hand if possible, if not, by the forceps (forfice) and if it is corroded, the cavity is previously to be filled with lint or well fitted lead so that it will not break under the forceps. The forceps must be drawn straight up lest, the root being inclined the fragile bone in which the tooth is fixed be broken, one side or the other; consequently danger is never absent in the operation at all events in the case of short teeth which have roots almost longer. For often where the forceps cannot seize the tooth or does seize it without effect, it seizes and breaks the bone of the gum. Where there is an excess of hæmorrhage, one may know that something has been broken off the bone. Accordingly the shell should be examined with the probe (speculum) and drawn with the forceps (vulsella). If this is unsuccessful the gum should be incised until the loose shell of the bone is seized.

"If this is not done at once the jaw hardens externally, so that it is not possible to open the mouth. A hot cataplasm of flour and fig should be applied until pus is excited, then the gum should be incised.

"It is to be noted that pus flows profusely from a broken bone—so that even then it is proper to extract—sometimes indeed, from an injury of this kind a fistula makes its appearance which must be got rid of.

"A scabrous tooth of which part is black is to be scraped

and anointed with roseleaves powdered to which a fourth part of gallnut and another of myrrh are added. Sour wine is to be held in the mouth frequently, the head is to be covered, much walking, exercise and friction of the head had, while acrid food is not to be used.

"If any teeth are loose from a blow or other accident, they are to be tied to others which hold fast, repressives are to be held in the mouth, such as wine in which pomegranate rind has been boiled or into which hot gallnuts have been thrown.

"If, again, in children one tooth grows out before that which should fall first, has disappeared, it should be drawn clean out: while the one which is produced in place of the former, should be pressed daily with the finger till it arrives at the proper size.

"Whenever the root is left after the tooth is drawn it should be extracted with that kind of forceps the Greeks call *rhizagra*" (that is the "Punch" formerly used for extracting roots of teeth).

About the last place one would expect to find any tooth remedies is a treatise on Vipers. But in the celebrated work of Marcus Aurelius Severinus, *Vipera Pythia* *De Natura Veneno Medecina Demonstrationes et Experimenta Nova*, published at Padua, 1651, I read: "Conrad Tigurinus in his work on Serpents adds that the application of a viper's tooth elides toothache: also Pliny in Lib. 30, Cap. 5, alleges dentation to be promoted by vipers' teeth being attached to the infant. So Ponsettus believes pain in the teeth of adults to be relieved by tying the upper teeth of the enhydrus to the upper teeth of the patient, the lower to the lower. Moreover to scarify the aching teeth of men around with the largest tooth of the male white enhydrus will effect a cure," p. 359.

The word *enhydrus* is accurately *enhydris* literally transcribed from the Greek; Herodotus uses *enhydris* of the otter; lib. ii, 72; iv, 109: but others use the word of the watersnake. Pliny is the only classical Latin writer who has the word at all—he employs it for the watersnake.

In his *Naturalis Historia*, lib. XXX, 3, 8, he says: Moreover, for pains of the teeth some say the ashes of the heads without the flesh of dogs that have died of rabies is a sovereign remedy dropped with cyprus-oil into the ear on the side of the aching teeth. The largest, left tooth of a dog, the aching tooth being circumscribed; or the bone from the back of a dragon (*draco*) or of an *enhydris*—this is a male white serpent—they circumscribe with the largest tooth of this—they rinse the canine teeth with wine reduced to half its volume by boiling. The teeth are scarified with the bones of the lizard (*lacerta*) taken from its forehead in the full of the moon so that they do not touch the ground. . . . the ash of dogs applied with honey assists the slow dentition

of children: a dentifrice is made in the same way. For hollow teeth the ash of mouse dung is inserted or the dried liver of lizards. If the heart of a snake is eaten or even applied it is considered effective. There are some who direct to eat a mouse twice a month and so avoid aches. Earthworms boiled in oil and dropped into the ear on the side of the toothache give relief—the ash of the same applied to corroded teeth makes them fall out easily; applied as an unguent it helps aching sound teeth—it should be burned in an earthenware vessel (*testa*). It is advantageous too to wash the teeth with a decoction of mulberry root in squill-vinegar. Then that little worm which is found in the plant called Venus' Lip inserted in the cavities of teeth is very helpful. . . . and bugs from the mallow are dropped into the ears with oil of roses. The fine sand which is found in snailshells inserted in the cavities of teeth, stops the pain immediately. The ash of empty snailshells with myrrh helps the gums—the ash of a serpent burnt with salt in a jar along with oil of rose (is) dropped into the ear on the opposite side. The cast off skin of a snake heated with oil and pine-tar is dropped into either ear; some add frankincense and roseoil. This same preparation inserted in the cavities make the teeth come out without difficulty. I myself think it useless to speak of white snakes sloughing the membrane at the time of the rising of the Dog Star as that is not seen in Italy and it is much less credible that in warm regions this sloughing is delayed so late, and indeed the cast-off skin aged with wax they say draw the teeth quickly. And the tooth of snakes bound on mitigates the pain. There are some who believe that a spider caught with the left hand and ground with rose oil dropped into the ear on the same side is valuable." (The words I translate spider are *araneum animal ipsum*; they may mean the shrewmouse). . . .

"They say that the taste in the mouth is improved if the teeth are rubbed with mouseash mixed with honey: some mix the roots of fennel. If the teeth are scraped with a vulture feather, the breath is made sour—while to do the same with a porcupine quill tends to firmness. . . ."

Pliny in another passage, *Nat. Hist.*, lib. xxxii. c. 7, 26. says:

"Toothache is relieved by the gums being scarified with the bones of the seadragon: the decoction of the brain of a puppy (*canicula*) in oil and applied so that the teeth are washed with it once a year. Moreover to scarify the gums with the root of parsnip is very useful in toothache. That is triturated and anointed with white hellebore and it extracts the teeth without trouble. The ash of salt fish burned in an earthen vessel added to powdered marble is among the remedies; and old tunny fish burned in a new vessel, then triturated is excellent for toothache. They say that the backbones of all kinds of salt fish burned, triturated and un-

guented are equally beneficial—and frogs are to be boiled one in a half pint (*hemina*) of vinegar, the teeth washed with the fluid and the fluid kept in the mouth. If squeamishness is an obstacle, Sallustius Dionysius used to hang them up by the hind legs so that the virus would flow out of their mouths into hot vinegar—that he would do with many frogs—he gave frogs to those of stronger stomachs to eat with the broth. They believe that the maxillary teeth (the molars) are particularly healed in this way and loose ones made firm by the said vinegar. For that purpose some macerate the bodies of two frogs, the legs being cut off, in half pint of wine *dried*, the loose teeth to be washed with it. Others attach all of them to the maxillary—others again make a decoction of ten in three quarts of vinegar boiled down to a third, to stabilize the loose teeth. Then, too, the hearts of thirty-six frogs are decocted in a quart of oil under a potlid (i. e. in a covered pot) that this may be poured into the ear, for an aching jaw. Others apply to the teeth the liver of a frog, decocted and triturated with honey. All the above is more efficacious if marine frogs are used. If they are carious and fetid they throw a hundred of them into an oven to be dried during the night; then a sufficient quantity of salt is added and this is used for rubbing. The enhydris is a snake living in water and so called by the Greeks. They scarify the gums with four upper teeth of this snake in pains of the upper teeth, with the lower in pains of the lower—some are content with the canine tooth of them. They use, too, the ash of crabs; and the ash of mice is a dentifrice."

Sextus Plato, *De Cane*, ix, 24, says: "For toothache burn the tooth of a dog, decoct the ash in half a pint of wine, and gargle with it—a cure will be effected." In the same work, ix, 26, he says: "That the teeth may grow without pain, burn the tooth of a dog, triturate with honey and rub the gums firmly."

Habderrahmanus Aegyptius is said to have directed: "What is called the canine tooth of a dog appended to the neck of a child whose teeth have not yet appeared makes their eruption easy without any pain or injury." Delphin Ed. *Plin. Nat. Hist.*, vol. vii, p. 4080 note(d).

Quintus Serenus, c. 15, p. 314, says: "If by any chance you complain of corroded teeth burn mouse dung and put it into the gaping openings—the powder of earthworms roasted is also helpful." Marcellus Empiricus, Plinius Valerianus, Galen and others agree in this.

Marcus Aurelius Severinus was born in Calabria in 1580 and died at Naples in 1656—he was first a lawyer, then a medical man: he was fond of trepanning and the actual cautery and was one of the first to describe diphtheria. His fame was so great as a professor of medicine as to attract a

large number of students to Naples—he was a daring and harsh operator.

"Finally and in conclusion"—the celebrated Franciscan Friar, mathematician and botanist of note, Louis Feuillée, in his sumptuous quarto published in Paris, 1725, *Journal des Observations Physiques, Mathématiques et Botaniques*, of what he saw in Chile and Peru, tells us of two plants used by the Natives dentally.

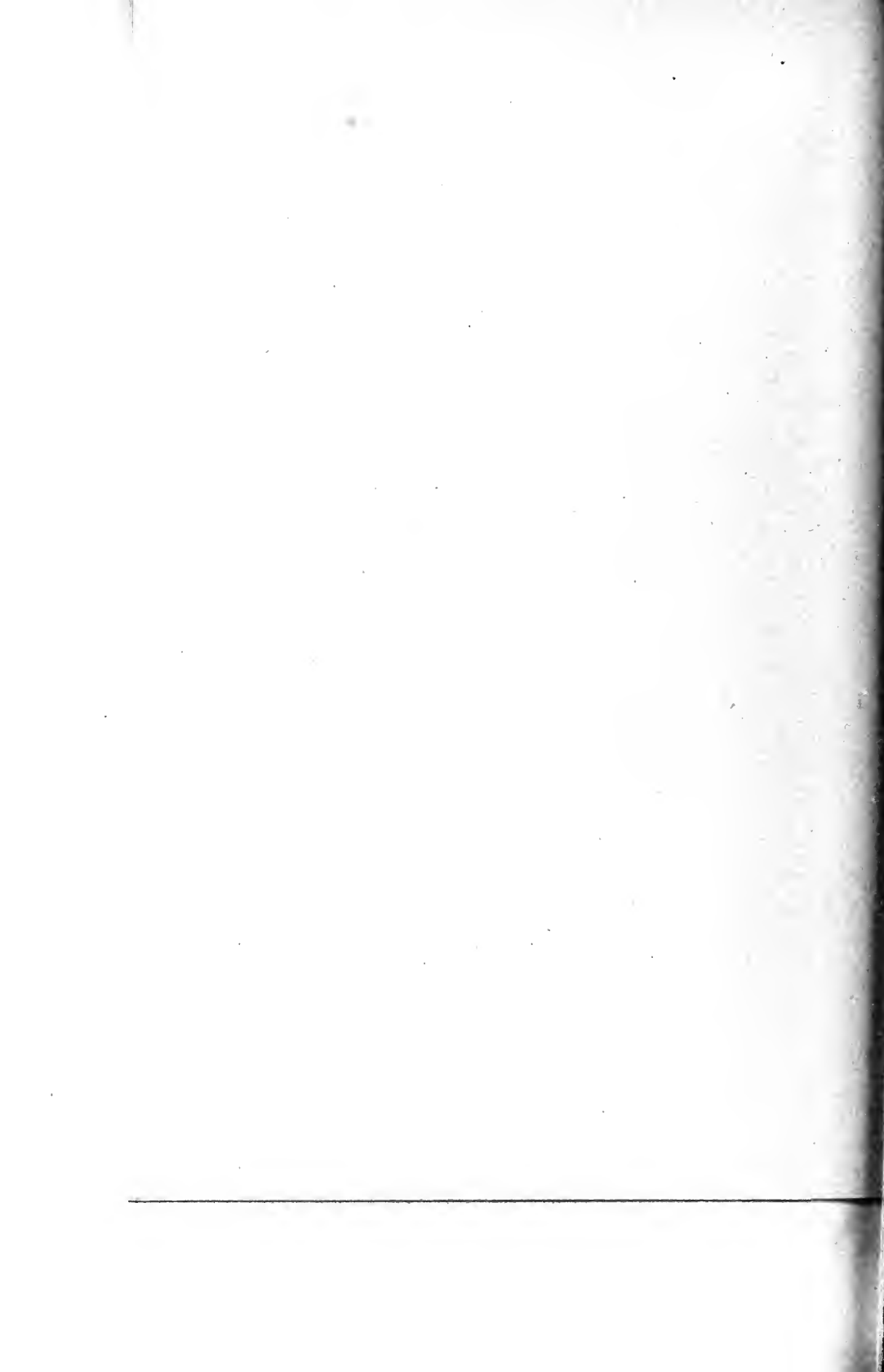
Chalo Origani folio. "The natives of this country (Chile) use this plant in severe toothache, washing the mouth with a decoction."

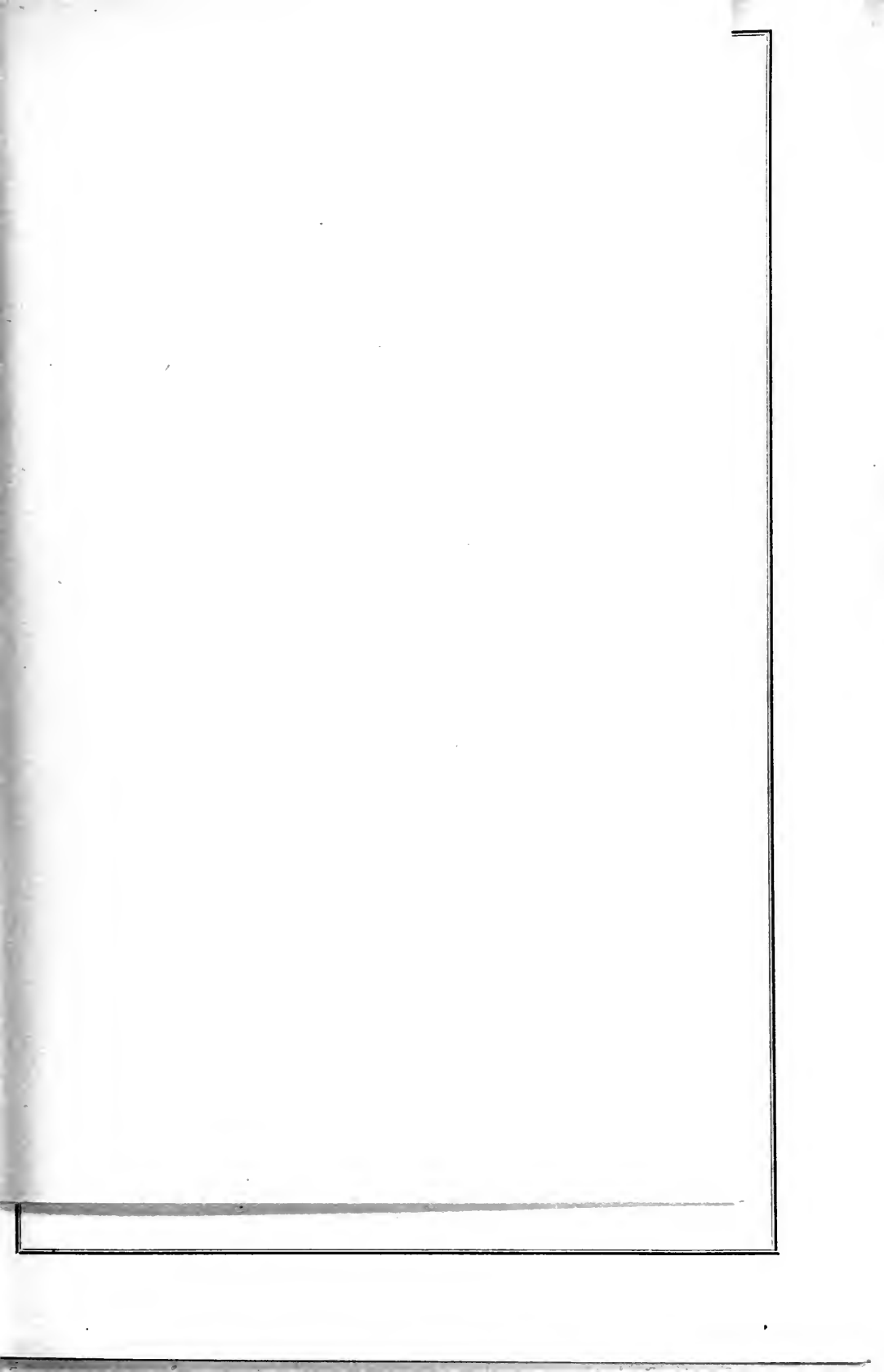
Geranium Columbinum perenne flore purpureo. Vulgo *Core-Core.*

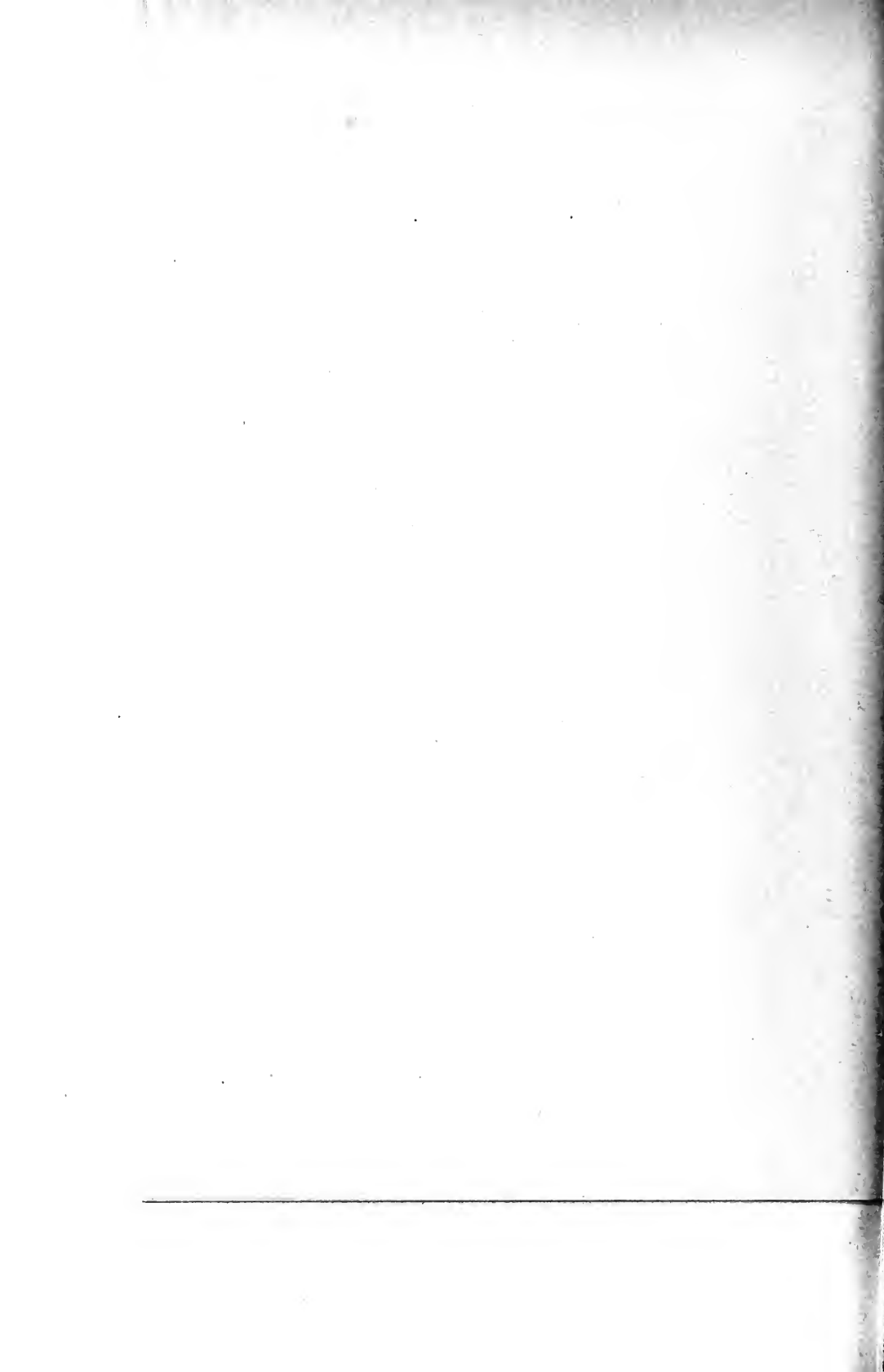
"This plant is admirable for relieving pains of the teeth: the Indians have the root boiled in ordinary water and when they have toothache, they rinse the mouth with it and feel themselves relieved at once; it also has the property of hardening the gums; that is the reason that those of advanced age make great use of it.

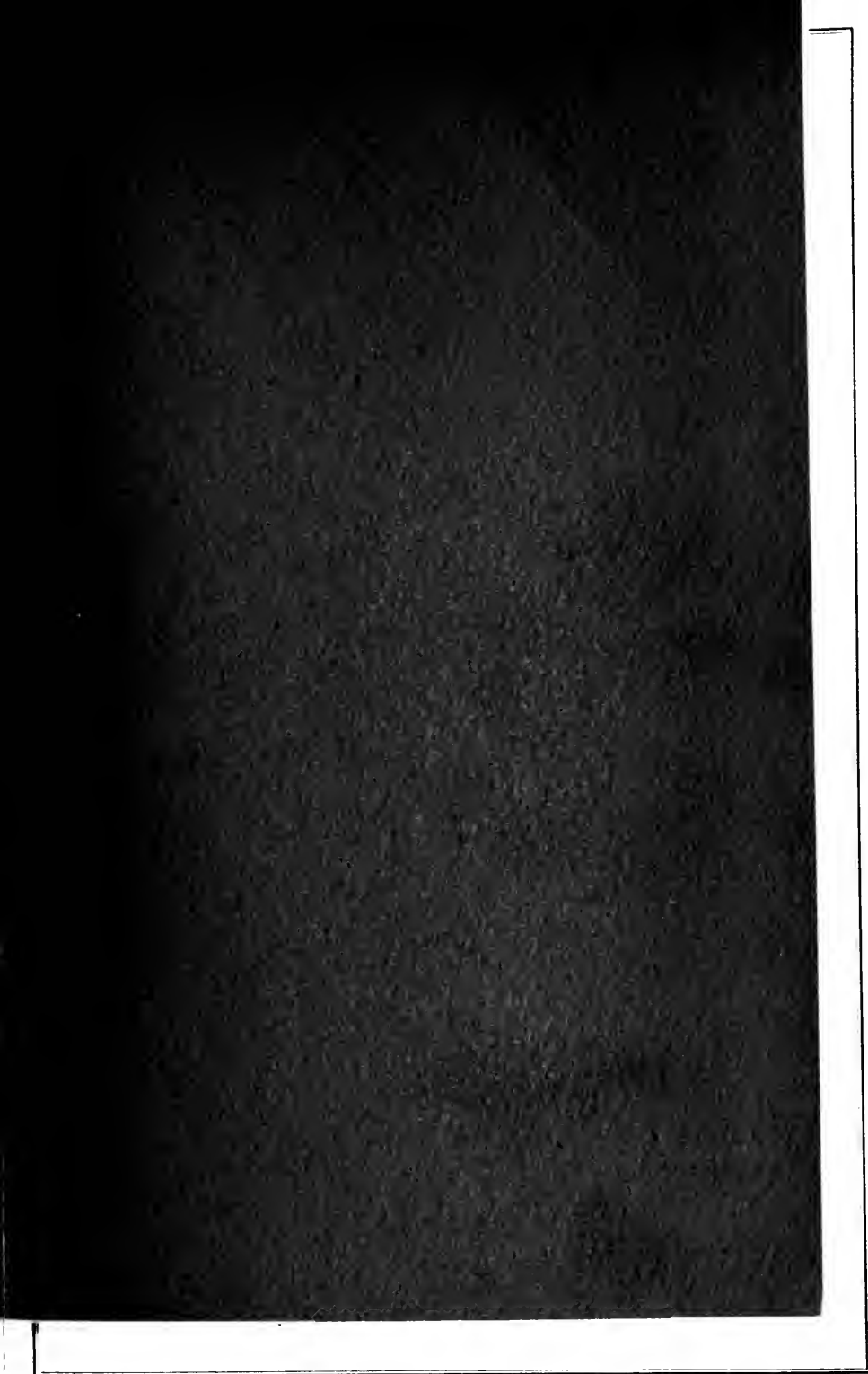
I almost forgot our own Samuel Thomson, the founder of the last formal System of Medicine, the Thomsonian or Botanical School which had great vogue in the second quarter of the last century and is not quite dead yet, though I believe it no longer has a College. Thomson with all his fondness for Lobelia and Capsicum had his own share of good sound "horse sense" and if he did not cure many he saved many from being killed *secundum artem* by the Regulars.

For toothache, Thomson, or at least his followers (for the copy of his little book in my possession printed at Hamilton, Canada West, in 1833 is silent on the matter) advised to "chew the xanthoxylum or tooth bark: a piece the size of the finger nail is sufficient at a time. Repeat till the pain ceases—as effectual as anything of the stimulating kind or No. 6 put in the tooth." Thomson's No. 6 was about the same as Tr. Myrrh. Co. and contained Myrrh, Capsicum, and Alcohol, sometimes Camphor and Turpentine. Thomson gives an excellent, and cheap dentrifice: "Bayberry or Candleberry . . . is good as tooth powder, cleanses the teeth and gums and removes the scurvy, taken as snuff it clears the head and relieves the headache. It may be given to advantage in a relax and all disorders of the bowels. When the stomach is very foul, it will frequently operate as an emetic. For a dose take a teaspoonful (i. e. of the roots dried and powdered) in hot water sweetened." Bayberry is *Myrica cerifera*.











The United States and the League of Nations



An Address by the

Honourable Mr. Justice Riddell, LL.D., D.C.L., Etc.

Before the Empire Club of Canada, Toronto,

November 5th, 1925

THE UNIVERSITY OF CHICAGO

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THE UNITED STATES AND THE LEAGUE OF NATIONS

AN ADDRESS BY THE HONOURABLE MR. JUSTICE
WILLIAM RENWICK RIDDELL, LL.D.,
D.C.L., ETC.

*Before the Empire Club of Canada, Toronto,
November 5, 1925.*

PRESIDENT BURNS introduced the speaker.

THE HONOURABLE MR. JUSTICE RIDDELL.

Mr. President, My Lords and Gentlemen,—In my address to you, I shall make no attempt to please—not running for anything, I am not looking for votes. What I shall say is what I believe to be the exact truth—and it will be said without regard for your views, preconceived or mature and with the frankness with which the Creator has endowed me. I may be wrong in my conclusions—*humanum errare*—but I have taken every pains to be right.

Anyone approaching the matter with a knowledge of the history of the official attitude of the United States from the beginning of its national career, would expect that people of that nation to be the first to grasp the opportunity of joining an association of the nations of the earth, having for its object the preservation of peace and the reign of justice.

One of the ablest and wisest men in the United States, whom I am proud to call my friend, a statesman who was once the candidate of his party for the Vice-Presidential Chair and may yet be a candidate for the higher office—I mean Dr. Nicholas Murray Butler, President of Columbia University—says in a paper intended for general circulation, from which I freely quote:—

"From the very beginning the covenant of the League of Nations which forms Part I of the Treaty of Versailles, has been gravely misunderstood by a large portion of the population of the United States, and misinterpreted by them. It is expressly set out that the subscribing States agree to the covenant of the League of Nations in order to promote international co-operation and to achieve international peace and security."

"This had been a boasted and eagerly pursued aim of the Government of the United States from the very beginning of the nation's history. Washington, Hamilton, Jefferson, the Adamses, Madison, Clay, Webster, Seward, Fish, Blaine, McKinley, Hay, Roosevelt, Root and Taft had each in turn been engaged in advancing this noble cause in official capacity. In our State documents and in the correspondence of our public men are to be found illustrations by the hundred of our profound interest in these matters, and, time and again, formal declarations by the Congress of the United States have given definite and specific support to them."

I may perhaps be allowed to relate a personal experience.

When the American Society for the Judicial settlement of International Disputes was formed, Mr. Taft was President of the United States. At the Banquet of this Society at its first meeting in Washington, December 17, 1910, I was sitting a few feet away from Mr. President Taft. I had been saying, (perhaps boasting) that Canada was the first people to pass in Parliament a Resolution urging the proper authorities to do their utmost to make a permanent treaty of peace between the English-speaking peoples, "so that every dispute between them, not *may* or perhaps *can*, but *shall* be disposed of by an international tribunal."

Bearing in mind the "big stick" methods of his predecessor, Theodore Roosevelt, and his fulminations against the proposition that anything involving what he called its "national honor" could possibly be submitted by the United States to arbitration or disposed of by any person or body of persons, nation or group of nations but the United States

itself, you may imagine my delight when the President spoke in favor of a positive agreement "to abide the adjudication of an international arbitral Court in every issue which cannot be settled by negotiation, no matter what it involves, whether honor, territory or money."

And there seemed scarcely a dissenting note through the Republic.

The spectacle, nothing short of extraordinary, displayed not a decade later, of this nation, one of the nations—one of the most important of nations—and one which has always advocated peaceful methods, actually spurning the most promising means ever suggested to have peaceful methods prevail, is as startling as it was unexpected.

Almost as I write comes the latest volume of Walter Hines Page's communications—he thought "it will be ours to save civilization"—"ours, of course, is the future of the world: when the world recovers its sanity—its first remark will be "Thank God for the United States." A general war "set the day forward for American leadership." It is true that he had the vision which enabled him to say: "The inevitable result as regards our relations with the English will be that they and we will in time become the League to enforce Peace"; but throughout that clear-eyed man saw the United States leading the nations in the ways of peace after the war. But the war over, peace came, and came as a levin stroke from a clear sky the Great Refusal, the abdication by that nation of world leadership.

What was the cause?

The answer is based not only on history and geography but also on personality.

I propose to give my own interpretation—it is not that generally held or at least generally expressed, but it is based upon a considerable knowledge of the American character and history.

While in the American system there is not the means of taking the views of the electorate at any time and on any subject provided by our more elastic Constitution, public sentiment is always made manifest in one way or the other, and public sentiment is all powerful there as here.

The weight of public sentiment has shifted its centre almost in our own time from the East to the Mid and Far West—I am, of course, speaking of the United States. We have yet to learn of our own West; perhaps, the next Session of Parliament will make the matter clear, perhaps it will not. But to continue—the most effective public sentiment in the United States is to be found in the enormous farming communities west of the Mississippi and in the small towns and cities which are supported by them. The population there is mixed—many of German descent—Scandinavians, not few, and others. These just named have little if any influence in creating public opinion—that is the effect of the native American, perhaps of American descent for three or four generations. These people of the Mid-West—speaking generally—have no world consciousness, no International mind, as Dr. Butler calls it—they are Americans, and for them the United States of America is the whole world—any part of the broad leagues of the globe outside that favored land is negligible. Everything tends to confirm them in that creed—there is little foreign travel, no foreign aggression, diplomacy is far removed and their own land furnishes all their hearts' desire.

Before we criticize or condemn, let us ask ourselves if we have none such in Canada, East or West.

Since the Civil War, there had been peace—the trifling Spanish War hardly provoked a ripple—the troubles of other people did not trouble them: "Babbitts" were the rule and the approved pattern.

On the outbreak of the Great War, those of this type could see no difference between this War and the wars in Europe which had preceded it—it concerned Europe and Europeans alone; and what had America and Americans to do with it or it with them?

Let me be pardoned another personal statement:

The year before the United States went into the war, I was in two Universaries in New England and two in the Mid-West—in New England, the people were almost as much interested in the war as Canadians, their sympathy was open, their approbation of Canada's action unfeigned and many were the expressions of hope that the United States would not continue to stand aloof. In the West, I heard almost no word of the war—inter-collegiate sports were far more interesting and important, the only sympathy for Canada was pity for her loss in gallant sons and in treasure—the United States had no reason to enter the war, for no gun yet invented could carry a shell from the sea to the Mississippi.

As the war went on, matters did not improve.

We blamed Woodrow Wilson for keeping the United States so long out of the war—and the letters of Walter Hines Page now being published must tend to confirm that opinion

Before the United States went to war at all, I was told the following by a gentlemen of the strictest integrity, incapable of deceit and having no end to gain by saying aught but the absolute truth. I shall not mention his name—some of you may know him, all of you have heard him and were I to tell his name all would recognize the justice of my description of him.

His words as nearly as I can recall I shall give, assuring you of the accuracy of the substance of them. He said: "Woodrow Wilson, whom I know intimately, sent for me to come and see him at the White House: when I went there, he locked the door

and we spent hours alone together: he walked up and down the room, in anguish, and said more than once to me, 'many blame me for preventing America from entering the war—if I were President of the Eastern States only we should have been in the war long ago; but I am President of all the United States and I must bear in mind the sentiment of the Middle States and the States of the West—they are not ready to go to war and it would be disastrous to go to war with a divided country. There is my typewriter, no one but myself knows the many messages I have written on that typewriter to bring us into the war and torn them up because the West is not ready—I must wait.' " My friend assured me that, in his opinion, Wilson was perfectly sincere in what he said.

Wilson's Attorney-General, T. W. Gregory, in a letter in January of this year, which appeared in the New York Times, truly says: "During the first two years of the war undoubtedly a large majority of our people and of Congress favored our keeping out, and this was the overwhelming sentiment of the people of the Middle and Western portion of the country." Let me give you an illustration of the feeling of the Middle West:

Martin Glynn, Governor of the State of New York, was selected to make the speech nominating Wilson for re-election in the Democratic National Convention of 1916—in his own home he told me that he went to the Convention in rather an apologetic mood—his speech was intended to be explanatory and consequently somewhat apologetic: in his speech he detailed the various instances in the past in which the United States had received provocation from other nations, ending each instance with the statement: "And we did not go to war." Before many instances had been detailed, the Convention took up the refrain before the speaker arrived at it—and the hall resounded with "And we

did not go to war." It speedily became obvious that what Glynn thought was rather to be apologized for, was in the view of the delegates a matter of pride—that Wilson was not to be blamed but to be glorified for keeping the United States out of the war.

It is common knowledge that it was the Middle West with the cry, "He kept us out of the war," which elected Wilson in 1916 and defeated Hughes, even with the powerful assistance of Roosevelt. The fear of this part of the voters is, you may think, also shown by the cautious way in which the Republican candidate handled the question, in contrast with the raucous shouts of his Progressive ally.

Well, Wilson was elected, the idiotic Zimmerman letter was captured by the despised British Secret service and broadcast over the United States—it was seen that there were other ways whereby shells could reach the Mississippi than from guns on the Atlantic, the complacency of the West received a rude shock, their Zion was troubled—and when Wilson, seeing the day had come and the opportunity, called upon the Senate on that epochal second day of April, 1917, to declare war against Germany, there was scarcely a dissenting voice.

It was the repudiation by Germany of her pledge as to submarine warfare which furnished the pretext for the declaration of war: it was the publication of the Zimmerman letter which made it possible.

When on the Zimmerman letter may I be permitted to digress a little? It amuses me to hear Englishmen tell how England "muddles through"—that is always the expression—England never muddles through and there was no country better prepared without showing it than Britain at the beginning of the Great War. Amongst other things, she had the finest Secret Service the world ever saw; compared with it the much belauded and much

feared German Secret Service was a child's rattle. The British Secret Service discovered the Zimmerman letter in several ways and sent it to the United States with information of how the United States could itself discover it.

This idiotic letter, which could not be repudiated and was acknowledged, convinced the nation at large and most in the Mid and Far West that the United States must needs go to war for its own protection from German aggression.

But all were not convinced—no few of those who voted for Wilson because "he kept us out of the war" were scandalized when he used the power they had given him to bring them into the war. The President was never forgiven by these: he is not forgiven to-day. The best known, and most widely read editorial writer of this district, I mean my friend Ed. Howe of Atkinson, Kansas, never wearies of girding at the war in his monthly *Journal of Indignation*.

And there are thousands like him—when you succeed in convincing them that Canada did not go into the war at the bidding of England but of her own free will, they look at us as a lot of fools mixing up with what did not concern us and losing valuable money and more valuable men in another's quarrel.

I say "once you succeed in convincing them that Canada did not go into the war at the bidding of England" but that is generally no easy task: the American is now the only person who speaks of Canada as a Colony—even so well informed a man as President Butler uses that terminology. I have yet to meet an American who understands our Constitution: and the average American thinks that we are governed by what he calls "England" and have no more freedom than had the American Colonies before the Revolution. All the world else, including British Statesmen, for twenty years have ceased to speak of Canada and Canadians as a Colony and Colonials, but the

American who should know us best clings to the traditional terminology. It may be that we have a few in Canada more loyal than the King, more British than the Lord Chancellor, who would fain have our country in her old Colonial status—but we are not going back.

The large section of the community who were dissatisfied with what they regarded a betrayal of his trust, never forgave Wilson. Another large section of the Community of quite a different kind, chiefly but not wholly in the East, blamed Wilson for keeping the country out of the war—and never forgave him either. Both sections mistrusted him, and their feeling was not far removed from—I know that in some instances it amounted to—actual personal hatred.

Then there was a whole political party which for political if for no other reasons wished to discredit him.

The stage being all set, the drama proceeds: Wilson the real author of the League of Nations did not invite Republican co-operation or advice, a very serious error but almost inevitable from his character and trend of mind. He came home in an atmosphere of glory, having accomplished what many of his predecessors had longed for in vain. But his success meant the increase in reputation of himself and the Democratic Party.

And now appears a tragic character, perhaps the most striking and pathetic character in the whole marvellous drama, Henry Cabot Lodge, of an old and illustrious family of Massachusetts, a graduate of Harvard, a historian of note, a man of means, a scholar, and a gentleman (as that word is generally understood), had long been in favor of some plan for world peace: the League of Nations was along the lines of what he approved, and had it not been the work of Wilson, there can I think be no doubt that he would have done his best to have it approved.

But between the men there was a deep seated antagonism, intuitively and subconsciously they hated each other: and both from party and personal reasons, Lodge set himself to humiliate Wilson. How he did it, he has himself disclosed in his recent volume, published since his death, which written as an *Apologia pro Vita Sua*, is an amazing disclosure of pettiness and spite—his *post obit* attack upon the dead is as unsuccessful as it is malignant: he has destroyed his own fame and has brought discredit on “the Scholar in politics.”

An extraordinary struggle took place in the Senate—reservation after reservation was passed only to be rejected by the President who self-willed, self-centred, self-advised, demanded the whole Treaty as it stood without amendment or reservation. It is not unlikely that had he been more conciliatory and tactful, the Treaty might have been accepted without substantial modification.

As a Canadian I have no hesitation in saying that I infinitely prefer the rejection of the Treaty to its acceptance with one of the proposed Reservations,—that known as the Lenroot Reservation. Senator Lenroot of Michigan who poses as a friend and admirer of Canada proposed a Reservation that the United States should have six votes instead of one as all other nations had. “Why?” do you ask? Because “England” had six votes, meaning thereby that “England” would cast the votes allotted to the Dominions including Canada: and degrading Canada, remitting her to her ancient condition of having no control over her relations with the world outside. The rest of the world were content to let Canada have one vote like themselves—France, Italy, Belgium, but the United States was to have six.

Dr. Butler says that “in 1919 . . . the United States was on the very verge of accepting the covenant of the League of Nations with a few carefully

drawn reservations"; such a reservation could never have been accepted by Britain or by Canada: and the last state would have been worse than the first.

The opposition to the League of Nations increased and ultimately by means disclosed by Lodge and others less creditable the covenant was refused.

This was the Great Refusal, the Great Abdication of the United States of its proud position as leader in the ways of peace.

Wilson's influence, never very great, was practically gone: his appeal to the Grand Assize of the people failed: his health was shattered and the glory of his life departed.

How stands the case to-day?

The American people are not content—they take pride in the fact that Americans are co-operating with the League—that the Librarian is an American, that many of those selected by the League for important work are Americans as the Commission General in charge of the financial reconstruction of Hungary, in all about a score of Americans "working in the various departments at Geneva that have to do with public health, with the mandates, with the protection of minorities, with the problems of transportation and with matters relating to safety at sea." They are jealous of the reputation of their country and are not satisfied with the inconsiderable part taken in world affairs by it. Few of these will go far as a well-known Republican Senator from Pennsylvania who, speaking of the Locarno Conference the other day at Chicago said of the framers of the Locarno treaties that "having borrowed our money, killed our sons, and turned the world upside down, they are now making the additional blunder of trying to irritate President Coolidge and force the hand of the United States." This was said partly in view of the report that a sort of European Coalition might grow out of the

Locarno agreements, strong enough to get along without America.

But such feeling is wide spread—the United States is taking a back seat, is negligible in world affairs—it is no longer the glorious saviour of democracy and civilization which it was in 1916 and 1917, but an object of scarcely concealed contempt as in 1915.

The invented bogey of the Superstate is still occasionally brought out, but it now no longer affrights many; the real difficulty is that party and politicians may “save their face.” I am wholly confident that could some way be found to effect that, the League would be accepted without delay.

But the United States still stands with Turkey and Hayti out of the circle into which Germany is soon to enter.

But what have we to do about it?

Nothing.

Every nation has the right to determine its own course without interference or criticism by outsiders: intelligent self interest will continue to govern the conduct of all civilized states—and no outsider has the right to complain or interfere. As we would resent interference with our national conduct by an American, so he will and should resent our interference. It is none of our business, how his country is run; and we must keep our hands off and tongues out.

My remarks have been historical, telling the historical facts as I understand them and not critical as finding fault with the past or missionary as advising for the future.

And not by way of adverse criticism or of advice do I cite their own poet—who knowing that “without vision the people perish” sings:—

Once to every man and nation comes the moment to decide,
In the Strife of Truth with Falsehood, for the good or evil
side.

Some great cause, God's new Messiah, offering each the bloom
or blight,
Parts the goats upon the left hand and the sheep upon the
right;
And the choice goes by forever 'twixt that darkness and that
light.

Hast thou chosen, O my people, on whose party thou shalt
stand,
Ere the Doom from its worn sandals shakes the dust against
our land?
Though the cause of Evil prosper, yet 'tis Truth alone is
strong,
And, albeit she wander outcast now, I see around her throng
Troops of beautiful, tall angels, to enshield her from all
wrong.

And no one will misjudge me if I quote our own
British poet (with a slight change) :—

To every land there openeth
A Way and Ways and a Way,
And the high soul climbs the High Way
And the low soul gropes the Low;
While in between on the misty flats
The rest drift to and fro.
But to every land there openeth
A High Way and a Low,
And every land decideth
Which way its soul shall go.

The United States is drifting on the misty flats if
she has not yet chosen the High Way; she has not,
thank God, gone to the Low; her soul must find her
rightful way—and may that be soon for billions of
treasure, millions of precious lives await the
decision. When by the side of our resplendent
British Commonwealth of Nations, heroine France,
marvellous Italy, virile Japan, starr-eyed Columbia
takes her stand, wars shall cease, the world and civi-
lization be secure.



TOOTHACHE THREE AND A HALF CENTURIES AGO*

THE HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., F.R.H.S., &c.
Toronto

Scientific dentistry is but of yesterday, but Adam had the toothache, at least every generation of his sons has had: and it may be of interest to know what the best men in olden times thought of it.

In Nancy, in 1572, was born Nicholas Le Pois—the plebeian name Le Pois, the Pea, he latinized to Piso—educated in Paris under Jacques Dubois, who latinized his own name to Jacobus Sylvius and became a famous writer on semeiology, Piso advanced in knowledge of medicine as it was then understood and, in 1578, was appointed physician to Charles III, Duke of Lorraine. In Frankfort, in 1580, he published a ponderous folio *De Cognoscendis et Curandis Præcipue Internis Humani Corporis Morbis* . . . which was a compendium of all that was known and guessed of medical science—*de omnibus et quibusdam aliis*. He died in 1590. The celebrated Herman Boerhaave nearly fifty years after his death edited it, adding a preface, and published it at Leyden in 1736; it was again reprinted at Leipsic in 1766, in two volumes octavo.

Whether Boerhaave deserves the reputation which he has of being the most famous physician since Galen's time, everyone must judge for himself; but it is certain that he was a man of great ability, learning, diligence and candor—"a great savant, physician and man." He was a real eclectic, taking truth wherever he found it—from regular or quack, methodist, humorist, iatromechanic, iatrochemical, iatro-

*Written for the Academy of Dentistry of Toronto.

mathematical or spagyrist—and besides, he wrote good Latin which all physicians of his time and even a few of ours, could not accomplish—I have heard it suggested that a dentist here and there might fail. Not least of his merits, he was the first to establish permanently the clinical method of instruction, without which modern medicine would be lost.

I use the Leipsic edition of 1766 and confine myself to toothache contained in Chapter *xlvi* of the First Book—*De dolore dentium*. Although Piso in this work cites more than forty authorities from Hippocrates down, in this Chapter he is to a certain extent “on his own.” He leaves aside the other affections of the teeth—projecting (*exerti*) or worn (*atteriti*); set on edge by cold or acid food, blackened from lack of cleansing, or livid from sweet and hot food, and crude and crapulous expiration; loose and wobbly (*vacillantes*) from external force or lax alveolus—the author attacks at once toothache because it is the most serious and is to be considered among the greatest tortures (*maximis tormentis*).

“Serious pain of the teeth is called odontalgia from the symptom and the part affected. The part affected is believed by most, if not all, to be manifold. For either the body of the tooth itself is afflicted, as there is no doubt that the teeth (although they are bones) can feel and suffer; or it is sometimes the nerve, which is a branch of the third pair distributed to every tooth and lying at their root. Not seldom the gums are inflamed. But a learned man who lived in our time thought that the nerve alone has any sensation and accordingly alone feels the pain. He says that the tooth suffers because the nerve is suffering, just as a man sees, not the whole body seeing but the eye only. . . . Others say that the tooth seems to feel and suffer because it receives a part of the gustatory nerves of the third pair—the nerve lies at the root of our tooth and so we believe the tooth itself suffers pain.”

But the fact that when the tooth is extracted some part of the pain remains, shows that the tooth does

suffer the pain; and if it is extracted the nerve breathes more freely, as it is neither stretched nor pressed by the tooth. But enough of the part affected.

The affection is itself the symptom and, as in other affections, it follows some want of health (intemperies).

To speak briefly as to the causes. "If the abnormality is a hot cause the result is inflammation, but the gums rather than the substance of the tooth itself or the nerves are affected. If the fluxion is cold it is chiefly from vitreous phlegm and the pain is most severe."

The author now after the fashion of medieval physicians indulges in a page or two of philosophical disquisition on *calor*, *siccitas*, *humiditas*, *destillatio*, *humores*, *defectus*, *redundantur*, etc., which we may pass over as well as the *prognostica*—and come at once to the *curatio*, treatment.

"If the pain arise from heat, ptisanes are to be taken, gruel (*alica*), lettuce, cucumber and the like, to be used in moderation and softened lest the teeth should be irritated. Patients are to abstain from wine and use water, in which has been decocted coriander or cinnamon seed . . . nor should they do what so many do, eat the hottest foods and drink the coldest wine or water; that excites the most severe pain, it rots the teeth and ruins them. Let them avoid sweet food, as honey and sugar as well as fats and milk. It is wise to cleanse the teeth . . . and wash them with wine. Let them also avoid acid and tart foods and everything tainted. Every effort should be directed to keeping the teeth from decay. Although such directions are common to all diseases, it is well to give them here before descending to the remaining treatment of this affection from heat.

"To put it tersely, frigids are to be exhibited but not frigid in excess—for the teeth are injured by the excessively frigid, of course because they are themselves so frigid and wholly bloodless. It is to be observed, too, that when the gums are affected the remedies are to be applied to the bare places

affected which are free from all kinds of pungency, whether from the moderately acid or of the earthy character. Consequently they shrink from vinegar as from a sharp and hostile sword: it corrodes the gums by its own acidity. The most soothing thing for them would be asses' milk when they are very painful and inflamed. And pimpinella triturated and applied helps a swelling of the gums.

"Where the teeth alone are affected or the nerve pellicles along with them, then together with these healing medicaments we add those which in their own substance consist of tenuous parts by which the force of them is carried deep within . . . and for a mouth wash, we prepare a decoction in white vinegar of root of haliacabus, aizoon, portulaca, perdicium and licorice. It is helpful to hold in the mouth a decoction of violets in wine.

"If there is a sensation of intolerable heat, use is to be made of hyoscyamus leaves or seed of garden pepper or lettuce seed decocted in white vinegar; oil of roses may be held in the mouth or oil of myrtle mixed with a little white wine: and the head should be moistened with the same oil of roses and it should be dropped in the ears. So too, a decoction of earthworms in oil is to be dropped into nearer ear; and a decoction of them with the oil of roses or of myrtle or oil prepared from the nymphæ and pepper should be used as an unguent on the external parts adjoining the aching tooth."

Having now disposed of the treatment of odontalgia *ex caliditate*, the doctor proceeds to the treatment of that arising *a causa seu intemperie frigida*, from a cold cause of indisposition.

"If there is a simple toothache from frigidity, the food should be ptisanes with pulegium or with rue; or pepper should be added after they are prepared. So, too, gruel of spelt or petroselinum. The drink should be wine but in moderation. For a mouth wash, a decoction should be made in vinegar or wine of organum, calaminth, hyssop, dictamnus, satureia. Moreover a decoction of veratrum niger eases pain

arising a *frigidity*: in the case of those on whom, sensation is quickly responsive, these decoctions should be made in posea. A decoction of fat woods such as tars or pitches is also helpful—these tars may be boiled in oil. It is of advantage, too, to moisten the head with oil of camomile, anise, iris or rue—as also the external part near the aching tooth. Castoreum decocted in oil should be dropped in the ears. Suffitus from the tooth of a dead dog is recommended, the smoke being taken into the mouth, and then the dog's tooth itself burnt and rubbed up in a little vinegar is to be held, hot, in the mouth. By reason of the special property of its whole substance the castoff skin of a serpent cooked in wine or vinegar is helpful, the same baked and ground up applied to the tooth with oil is also helpful."

Now the author deals with the treatment of the third kind of toothache—that arising from humidity.

"If the teeth are affected from humidity, the diet should tend to dryness with daily abstinence from food. The food given should be such as can be supped, gruel, bread moistened with soup, fine wheat flour, rice, polenta mixed with honey water, millet, lentils, the drier mountain birds, of vegetables, cabbage and the like. For drink, honey water, or water with a little wine added.

"During the pain, the place should be fomented with millet and salt. Mouth washes should be exhibited, astringent, drying or salt, unless the gums are also affected. Consequently we exhibit green olives decocted with tart vinegar and alum mixed with vinegar; in like manner, pomegranate rind and calyx, myrtle berries, balaustia, olives, blackberry leaves, cypress pills, the root of the wood sorrel; and anything which has by nature an acid quality if you concoct it with a little vinegar or wine is helpful if the mouth is washed with it. No little helpful is an ointment made of diamoron confection particularly if it has powdered alum added—or an ointment made out of the juice of nuts: so, too, the dried root of cinquefoil and stag's horn.

"If the teeth have become loose from old age, powdered alum ground up with troglodytic myrrh is helpful to them."

Now comes the fourth class—toothache *a siccitate*, from dryness.

"If the pain arises from dryness, the proper diet will be barley water, morsels of bread, moistened with chicken soup, cucumbers, mallows, soft boiled eggs and whatever food is suitable for patients that are deficient in moisture. The drink should be light wine diluted with water. Sharp and acid medicaments are to be avoided . . . least of all should astringent and moderately moist washes be applied such as hot water by itself—steam from water should be applied with a sponge.

"A mouth wash should be prepared from a decoction of bran or licorice or mallow—or from barley water or starch diluted with sapa or hot water. Asses' milk administered by itself is very useful.

"So far we have been dealing with the treatment of simple indispositions; however, if they are of mixed origin it is quite easy to discuss the treatment of such mixed diseases. In those indispositions which consist . . . in an excess of humors of course (palam) the first thing to do is to reduce the redundant humor by proper purgation . . . then treat the disease. When it happens that toothache makes its appearance from an excess of humors and a redundancy of blood, this should be evacuated by venesection of either the humeral or the median vein. That vein should be cut which has reference to the locus of the affection; and if it be necessary, the vein under the tongue may be cut or cupping glasses applied to the scapulae. If anything prohibits bleeding, reduce the superfluous humor by moderate and slender diet."

Now come topica, the topical application. "The body as a whole being evacuated, to the aching teeth are applied these things that are repressive and repellent and, afterwards, those that are partly repellent and partly discutient. There are, indeed, few diseases that call so much for repellents; and these are

the very ones which arise from a minor cause. Consequently we are often obliged to mix discutients from the first—or according to Galen, a little later.

“If the pain arises from inflammation of the gums, the most useful remedy is lentiscus oil, retained in the mouth—it is not nauseating, it is repellent without unpleasantly acid taste and discutient without mordacity. Too strong astringents are to be avoided, from which the parts would suffer as from a contusion, just as from acids like from erosion—the moderate are to be adhered to—after lentiscus oil, asses’ milk, sapa or the juice of dates. The decoction of stonecrop is also effective. For those affected in their proper substance or the underlying nerve, the strongest medicaments are to be used.

“The teeth are to be washed in vinegar in which oak galls have been decocted or the root of the halicacabus or myrtle leaves; in process of time, discutients are to be exhibited such as hyssop, melilot, fenugreek, althaea, pulegium, organum.

“Stupifacients should not be employed, except in the last resort and except in case of excess of hot humors. If there should be an excess of bile causing erosion of the teeth, the condition of the whole body not alone of the head is to be looked to and purgation by cholagogues resorted to. . . . If there should be an excess of frigid humors, and the toothache then arise, after an evacuation of them from the whole body including the head—in which case it is well to use antiphlegmatics which have the force of moderate astringents and strong discutients and should be administered hot, such as rue, polium, pulegium, organum, hyssop, or caper root decocted in vinegar or wine—it will be advantageous to use the same treatment as for toothache *ex frigida aut ex humida intemperie*, from cold or humid indisposition.”

Now, however, we should write on foramina in the teeth or those which are livid when this is caused by influx.

“If the malady does not yield to treatment and the pain continues, the tooth is to be extracted, par-

ticularly if it is livid or perforated or loose—either with the instrument or by medicament. A corroded tooth should also be extracted. If, however, it is not corroded or moveable, but is still painful, it should be dried up by actual cautery. These directions are gathered from Galen, Paulus (Aegineta), Aetius and others; but the following treatment is that of the more modern practitioners.

“If the pain arises from humors, mixed with blood, the bile if present, being first purged, the mouth is washed with vinegar in which have been decocted myrtle leaves or oak galls. In the case of extreme pain keeping the patient awake, a dram of theriaca or philonium dissolved in white wine is to be held in the mouth toward the affected part or the vapor from hyoscyamus seed in hot vinegar taken into the mouth by a funnel. Plasters made of pitch alone or of a mixture of mastich and gum Arabic are to be applied to the side affected . . . thus the flow of the humors is checked.

“After the body including the head is purged where the cause is frigid, pyrethrum is to be chewed, this draws away the pain. . . . Calefacients are to be injected into the ear on the side affected, such as the juice of onions, rue, or matricaria, or some calefacient oil such as oil of almonds, sweet root, lilies, sambucus, in which intestinal worms have been decocted, or of laurel or costus. Fumigation of any hot substance taken through a funnel allays the pain as for example from a decoction of satureia. If there are worms present, something bitter should be added so as to kill them and the teeth should be rubbed with theriaca.”

It is seldom that teeth ache unless they are corroded and the corrosion penetrates to the internal cavity, and touches the nerve—and consequently it follows that the maxillaries ache most of all.

In these the cavity is to be filled with aqua fortis. The hollow of the tooth may be filled with mastich chewed and made soft rather than with wax. Afterwards desiccants are to be used lest the applications

which clean the teeth should erode them by their acrimony. If there be fetor, musk is to be added, if putrefaction, myrrh—at all events if these patients are subject to headache or vertigo because they are injured by the odors. The external parts of the face are to be anointed with anise oil. It is well, too, to draw the humors outward so as to have no repletion. When they go outward, the toothache ceases for a time, the face being inflamed.

The body being purged by pills, we wash the teeth with the sharpest vinegar in which cypress fruit and alum have been decocted. The best prescription is as follows: Take of pepper and pyrethrum each half a dram, of theriaca two drams, mix in the form of small pastilles, one of which apply to the aching tooth.

Hot linen is to be applied frequently to the aching jaw or little sacks of the leaves of amaracum, betonica or cypress which are applied hot after being sprinkled with white wine. Brandy may be held in the mouth or applied with cotton to the part affected. Oil extracted by distillation from caryophylli is useful—they call it Quintessence—so too the chemical oil of sage or rosemary.

When the gums are swollen, a plump fig split may be usefully exhibited.

In the warmer fluxion, trochees may be prepared from the seed of hyoscyamus, milk, mastich, crocus, in conserve of roses which may be applied to the part affected. Some even add opium in excessive pain. Anodyne cataplasms are used in great pain, made of bread crumbs with oil of roses, etc., or of the pulp of plums cooked under ashes and mixed with a little water to which may be added mucilage of the seed or root of althaea.

If there is caries of the tooth, the blackened and eroded part must be shaved away lest the sound part and the adjoining teeth be infected.

Insensitiveness (stupor) of the teeth is cured by portulacca or oil from immature olives or amurca

cooked in a brazen vessel until it has the consistence of honey and used as a unguent.

GLOSSARY

Aizoon minus is the stoncrop, *Sedum album* (the Aizoon majus was houseleek, *Sempervivens Tectorum*: the stoncrop was also called *Sempervivens minor*).

Alica, properly speaking, is spelt, *Triticum spelta*: but as the grain was often used to make tisanes, the word was extended to the tisane itself. It is so employed by Celsus, Pliny and Martial. The epigrammatist says: *Nos alicam, multisim poterit tibi mittere dives; Si tibi noluerit mittere dives, eme.* Epig. xiii, 6. We send you barley water, a rich man may send you hydromel: if the rich man don't want to send it to you, buy it yourself.

Altercum, hyoscyamus. Pliny, *Nat. Hist.* 25, 4, 17, says that altercum is the Arabic name for what the Greeks call hyoscyamus (hogbean)—in Latin *Suis faba* or *Faba porcina*.

Althaea, marshmallow: *Althaea officinalis*.

Amaracum, marjoram: *Origanum majoram*.

Amurca, the watery part which flows out in pressing olives, the scum or dregs of oil.

Amylum, starch. Pliny, *Nat. Hist.*, 18, 7, 17, says that is made from all kinds of *triticum* and *siligo* (spring and fall wheat); the best from *Triticum trimestre*, a wheat that ripens in three months.

Asses' milk, lac asininum, used in pulmonary affections.

Astringentia, astringents, medicines which were believed to constrict the organic textures of membranes—such as mint, millefoil, certain nuts and berries. External astringents were often called styptics.

Balaustia, flowers of the pomegranate, *Punica Granatum*, especially of the greater Wild pomegranate, *Malus Punica sylvestris major* were used largely in diarrheas, &c.

Betonica, wood betony, *Betonica officinalis*, of old a great "dryer," vulnerary, diuretic, cephalic and ecbolic—it is, however, in fact, almost inert.

Calamintha, calamint or calaminth, of old a diuretic, emmenagogue, ecbolic, alexipharmic—a whole genus of the *Labiata*, now generally called *Clinopodium*, basil.

Calefacients, heating medicines, like mustard and pepper.

Capparis, Capers, prickly caper bush: *Capparis spinosa*—the buds are the well known condiment—the bark, "cortex," was also used as an astringent, diuretic and alterative.

Caryophyllus, cloves.

Castoreum, castor, from the beaver, an antispasmodic, nervine, sedative.

Chemical medicines were those obtained by chemical means, fire, &c., on the system of Paracelsus, as distinguished from Galenic medicines, generally "simples."

Conserva rosarum, generally of red May and June roses. This conserve was in high repute for pulmonary troubles, especially hemoptysis.

Cornu cervium, deer's horn, shavings boiled in water or wine were considered emollient and nutritious.

Costus applied to several plants oriental and aromatic—chiefly the *Costus aromaticus* (or *Arabicus*), tonic, diuretic, carminative, emmenagogue, &c.

Crocus, saffron, stimulant, diaphoretic, emmenagogue.

Cypressus the ordinary cypress. *Cypressus sempervirens*, berries, leaves and wood are all astringent.

Cypress fruit, berries of cypress.

Cytinus sometimes the calyx of the pomegranate blossom (*Balaustion*): sometimes the *Asarum hypocistis*.

Diamoron, a syrup prepared from honey and mulberries. (Mori) used generally as a gargle: sometimes blackberries were substituted for mulberries.

Dictamnus, fraxinella or origanum, a nervine, anthelmintic and emmenagogue. The species generally employed was *Origanum Dictamnus*. Dittany of Crete—almost inert. Pliny, *Nat. Hist.*, 8, 27, 41, tells an extraordinary story of this plant "*Dictamnnum herbam extrahendis sagittis cervi monstravere, percusi eo telo, pastuque ejus herbae, ejecto.*" The deers showed the plant dictamnus efficacious for extracting arrows, struck by a missile it was ejected when they ate of this herb. Aristotle says wild goats do this, not deers.

Discutients, medicines reducing humors or all swellings—the word was sometimes applied to carminatives.

Foenugraecum, fenugreek, *Trigonella fœnum*.

Galla, oak galls.

Halicacabus, a kind of bladderwort, *Vesicaria* or *Physalis*, called also Morion, Moly, &c., Pliny, *Nat. Hist.*, 21, 31, 105, says it produces death more quickly than opium, but "*præsentaneum remedium ad dentium mobiles firmandos si colluerentur halicacabo in vino,*" a rapid remedy for making loose teeth firm if they are washed by halicacabus in wine. He also says that skilled soothsayers drink an infusion of the root. Its only known quality is diuretic.

Humor: The physiology and medicine generally of the Middle Ages cannot be understood without the theory of humors. There were supposed to be four humors or fluids of the body—sanguis (blood), chole (bile or yellow bile), phlegma (rheuma or pituita) and a mythical melancholy (black bile). On the proper mixture of these health depended: if any were in excess "distemper" "intemperis" followed—"temperies," temper, really means a due mixture of humors, blood and yellow bile being hot, the others cold.

While most physicians until almost modern times considered that there were four temperamenta, i. e., four forms of undue mixture of humors by an excess of either sanguis, phlegma (rheuma, pituita), bilis (chole) or melancholia,

giving to the subject the sanguine, phlegmatic, bilious or melancholic temperament, respectively, there were many whose opinions varied from those of the majority.

For example, the celebrated Dr. Archibald Pitcairne, the teacher of Mead and Boerhaave, in his Latin work *Elementa Medicinae Physico-Mathematica* . . . London, 1717, does not admit of a sanguine temperament at all. In his *Propositiones* as well in the body of the work he makes the Temperamenta three in number. I translate extracts from the *Propositiones*:

"LXV. There are three general temperaments.

LXVI. That fluxility of the blood which (given the impetus of circulation) permits that the Bile is secreted in greater proportion to the other secretions than is usual in most of the inhabitants of the same region exhibits itself in the bilious temperament.

LXVII. That fluxility of the blood which (the spleen being properly constituted) permits that the proportion of the secretions by the kidneys and sudoriferous vascula to the other secretions is too great exhibits itself in the melancholic temperament.

LXVIII. The Pituitous Temperament is where by reason of the force given to the blood by the heart the proportion of saliva to the other secretions is too great."

He adds that anyone who has any of the Temperaments has disease nascent in him.

In the Text, Lib. I, cap. III, sec. 6, he says that it is an error to make four temperaments and that what is called the sanguineous temperament is in reality *plethora*; that temperament comes from the fluxilitas, not the quantity of blood.

Hyssop, *Hyssopus officinalis*, an aromatic stimulant used in an infusion.

Licorice, glycyrrhiza, sweet root, *radix dulcis*.

Malicorium, pomegranate rind.

Maticaria, feverfew, pythenium, tonic, stomachic, emmenagogue, anthelmintic, diuretic, &c.

Melilotus, *Trifolium melilotus*, melilot, a kind of clover.

Myrrha troglodytica, myrrh, supposed to come from the land of the troglodytes who lived in caves—probably from Arabia Felix. But see Pliny, *Nat. Hist.*, 6, 29, 33, 34.

Nymphaea, the common white Pond Lily, *Nymphaea odorata* and *Nymphaea tuberosa*.

Oleum anethinum, oil of dill or anise.

Oleum chamaemelinum, oil of camomile.

Oleum irinum, oil of violets (chiefly the Florentine violet, orris).

Oleum myrteum, oil of myrtle.

Oleum rosaceum, oil of roses.

Oleum rutaceum, oil of rue.

Olivæ omphaticides, olives falling before they are ripe.

Origanum, wild marjoram, has a pungent oil exhibited in

toothache. Dr. John Quincy in his *Complete English Dispensatory*, London, 1749, at p. (157) says: "It is a mighty thing with some people for the toothache; they holding it upon some lint or cloth in the mouth as near the part in pain as they can."

Papaver, pepper.

Pentaphyllum, cinquefoil, *Potentilla reptans*.

Perdicium, pellitory, *Xanthoxylum fraxineum*, Pliny, *Nat. Hist.* 22, 17, 19, calls it also parthenium helxine and sideritis, and says that it has the name, perdicium, because the part-ridges (perdices) like to eat it—he advised it for gout.

Petroselinum, *Apium petroselinum*, rock parsley.

Philonium or philonanium antidotum, a celebrated eye salve invented by Philo.

Piceae, the different kinds of pitch.

Pimpinella of many kinds, here the *Sanguisorba* which, says Quincy, *op. cit.*, p. 87, "takes freckles off the face, eases the toothache and ripens swellings. But notwithstanding these wondrous virtues . . . it is now (1749) almost out of practice and is in no great esteem." *Sic transit gloria*.

Polium, poley, Germander, *Teucrium polium*, a strong smelling plant. Pliny, *Nat. Hist.*, 21, 7, 21, says that some call it Teuthrion, that Musaeus and Hesiod praise it extravagantly as good for everything (ad omnia utilem) and the common (but baseless) idea was that its leaves were white in the morning, purple at noon and blue at sunset.

Portulaca, purslane, antiseptic and aperient; According to Quincy, *op. cit.*, p. 198, "a great assuager of choleric heat" and good for the scurvy.

Posca, a drink of mingled vinegar and water; oxycrate.

Ptisanes, tisanes, aqueous medicines like barley water.

Pulegium, *Mentha pulegium*, pennyroyal, fleawort, aperitive, discutient, carminative, emmenagogue, ecboic, etc.

Repellents, medicines for reducing a humor, &c., by driving out the fluid. See Quincy, *op. cit.*, pp. 201, 202.

Repressives, medicines to prevent or cure a tumor, &c.

Rubus, berries of the raspberry kind.

Rumex, a dock or sorrel, *R. sylvaticus*, woodsorrel.

Ruta, rue. Salvia, sage. Sambucus, elder.

Sapa, a rob of grape must or new wine boiled thicker—when not so thick, it was called defrutum.

Satureia, summer savory, *Satureia sativa*.

Senecta, the slough or castoff skin of a snake.

Sweetroot, licorice.

Taeda, tar of various kinds.

Theriaca, a medicine of many ingredients good for everything, preventing and curing—a mithridate.

Veratrum album, white hellebore.

Veratrum niger, black hellebore.

Vermes terreni, earthworms as distinguished from lum-

brici, intestinal medicine.
Viola, violet, pansy or flag.

GENERAL NOTE

It may be of interest to add here some medicines approved by another physician—not of so much note, indeed, as Piso or Boerhaave, but still of considerable fame in England in his time. Thomas Fuller, M.D., Cantab. (for whose other book, see Bass' *History of Medicine*, Am. ed., p. 805, n. 1) published his *Pharmacopeia Extemporanea or a Body of Medicines* . . . first, in Latin (five English and two Dutch editions) and then in English—the second edition in English published at London, 1714, is much the best and is that I quote from.

For odontalgia he has many medicines—Electuarium Apophlegmaticum, Epithem Aluminous, Errhines of various kinds, Gargle of Pellitory and other Gargles, Masticatories, Pellets, Epispastic Plaister, and several other Plaisters, Dentalgic Powder, Odontalgic Tincture, &c.

It will be sufficient to give the prescription for a few:

“Aluminous Epithem—Take burnt Allum Powder'd half an Ounce, Nutmeg 1 Dram; Honey of Roses, as much as sufficient to make it of the Consistence of an Ointment, which spread upon Paper, and bind upon that side of the Face that is in Pain, with a convenient Cloth.

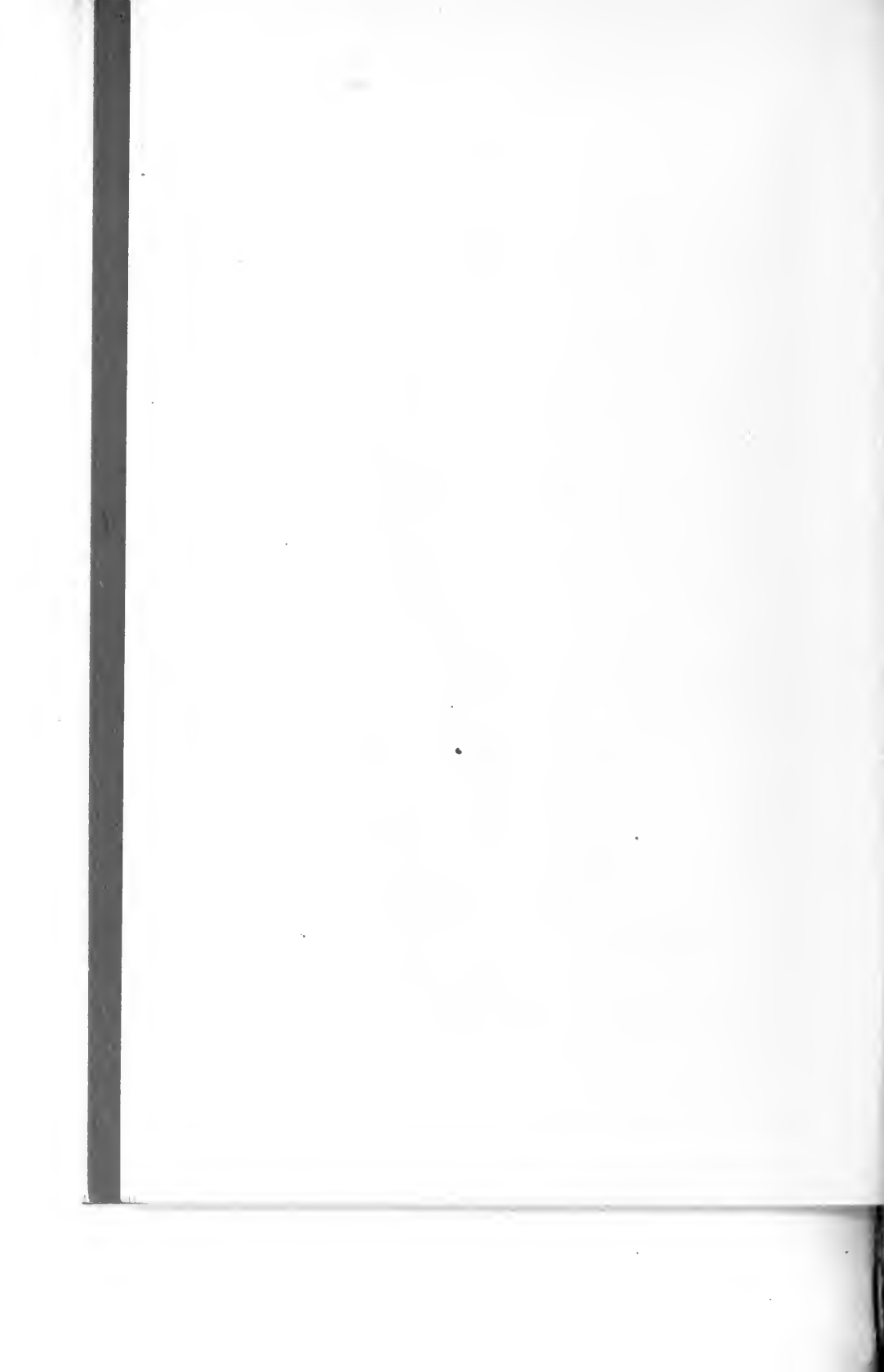
“The Toothache is entitled to it, and it hath place when the Cause is not a hollow, rotten Tooth but a sharp Rheum affecting the whole jaw, and one Side of the Face, which bringeth a conflux of Humours and an Inflammation For: it repells very powerfully.”

If the pain came from a hollow tooth, he recommends:

“Pellets for the Teeth, Take Asa Foetida, 8 Grams, Camphire, Dragon's Blood, each 1 Grain, Oil of Pepper, 2 Drops, mix. It's to stop a hollow Tooth: “Twill oftentimes ease the most Sharp Pains and prevent their Return.”

We end with: “Odontalgic Tincture: Take Roots of Pellitory of Spain half an Ounce; Tobacco cut and dried, Balau-stines, of each 1 Dram; Cloves a Dram and a half; black Pepper 1 scruple; Camphire half a Scruple; Hungary Water 8 Ounces; sharp Vinegar 2 Ounces; extract a Tincture; to which (when filtred) add Liquid Laudanum (not tar-tariz'd) 2 Drams. It may be used with a Decoction of Savine. Let Patient be careful not to swallow it down.”

In a small quarto published in London in 1627: *A Thousand and Notable Things of Sundrie Sorts*, are to be found very many receipts and nostrums. The author, Thomas Lupton, tells us how to stop an “aking tooth”—he recommends “a certaine woorme with many feet (of some called a swyne louse) to be pricked with a needle and the tooth touched with the same needle; the payne thereof will cease immediately. This I got hardly out of an old booke.”



Canada—a Nation

By

THE HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., D. C. L.,

Justice of the Supreme Court of Ontario.



Reprinted from The Kiwanis Magazine

May, 1926

Canada—a Nation

By THE HONORABLE WILLIAM RENWICK RIDDELL, LL.D., D. C. L.,

Justice of the Supreme Court of Ontario.

WHEN the very important drama was being played before an anxious world in the Senate of the United States looking to the great Republic's acceptance of the Treaty of Versailles and entry into the League of Nations, a well known Senator insisted on a reservation that the United States should have six votes as the British Empire had six. There is no reason to suppose that the Senator or those who voted with him had any desire to flout Canada or had any sense of incongruity.

But the underlying and motivating idea was that there was a British Empire, a national entity, with six votes and that these six votes would be cast as one. True, the several parts of that "Empire" had signed the Treaty and joined the League separately and independently as individual nations, but there was the "Empire." Nothing better illustrates the tyranny of words; had the terminology "British Commonwealth of Nations," which is favored by that wise young man, the Prince of Wales, been adopted, some of the misunderstanding would probably have been avoided and, indeed, the scant respect shown to a similar reservation proposed on the United States adherence to the World Court indicates some change of view.

Whether the United States joins or refrains from joining the League of Nations or the World Court is for the United States alone; we Canadians recognize that it is none of our business and we have nothing to say about it. But we should like our position in the world of Nations to be understood. We are quite able and willing to live our national

life without an appreciation of it by our brethren to the south if we must, but we should prefer that they know.

A perfervid lady, the other day in Toronto (I need not, I fancy, tell her nationality) declared that "wherever there is an empire, there is tyranny." I am not concerned here to contradict her even when with this as a major premise, she depicted tyranny as rampant in a certain beloved land—in the sense in which "empire" was used by her, there is no British Empire. The British Empire in that sense, the old British Empire, had its quietus on July 4, 1776: it is as dead as Queen Anne and all the King's horses and all the King's men could not set it up again and would not if they could.

It may seem an odd saying to assert that Americans generally do not sufficiently appreciate the Declaration of Independence—yet I venture to make the assertion. They say enough, *satis superque*, of the release of the American Colonies from the tyranny of what they always call "England," of course in reality a half insane King and his obsequious Ministers. They speak of the political freedom demanded and achieved for these colonies and that is well.

But as a rule they say little or nothing of the effect on Britain and the British world. I heard the Lord Chancellor of Great Britain in Westminster Hall before a vast audience of lawyers, American, English and Canadian, in July, 1924, say that the Declaration of Independence was the greatest event of the century in British history, and in my opinion, he minimized, not magnified.

The Declaration of Independence revolutionized British thought and political theory, it slew the old time-honored but evil proposition that colonies existed for the advantage of the Mother Country and gave Britain and Britain's rulers to understand once and for all that peoples of our breed will govern themselves whether for good or for ill.

The problem of working out this principle without doing violence to the old and beloved forms was not easy; but the problem has been solved and largely by Canadians.

The method we have followed makes it difficult for an American to understand. His Constitution is written and means what it says: ours is to a great extent unwritten and must be taken with our interpretation. We have retained the old forms but revolutionized the spirit. We have built more stately mansions on the old foundations, we have engrafted in the old roots new shoots to grow and bring forth new fruit and that more abundantly. Never was the saying more true: "The letter killeth, and the spirit giveth life." While we do not regard our Constitution as sacrosanct and we change it without hesitation when we are not satisfied with it, when we do change it we respect it as changed and until we change it again.

We have a King, but while he reigns, he does not rule. He leaves the ruling to the people to whom it belongs. So far as Canada is concerned these "people" are the people of Canada. We are not subjects of England or of Great Britain or of the United Kingdom. We are not subjects of Englishmen, of Scotsmen or of Irishmen. We, like Englishmen, like the British, like those of the United Kingdom, are subjects of the King who is King of the British Dominions beyond the seas as well as of the United Kingdom. Before 1900, the King

was King of the United Kingdom of Great Britain and Ireland—so long as Queen Victoria lived, she was not bothered about any change; but as soon as Edward VII came to the throne, the fact that such countries as Canada were no part of the United Kingdom was recognized by the change in the Royal Title to King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas. "British Dominions beyond the seas" does not mean as it once would have meant, "Dominions beyond the seas owned by Britain" but "Dominions beyond the seas occupied and owned by a British people." The change in the King's title in 1900 has a profound significance.

Neither Britain nor the British people interfere in our affairs any more than we in theirs; we pay them no tribute any more than they pay tribute to us; we care no more for their opinions than they for ours. We run Canada to suit Canadians, not to suit Britishers. To use the words of a former Prime Minister of Canada: "Canada will be an adjunct of no nation on this side of the Atlantic or the other." That does not imply that we are not bound to the British folk across the sea in the strongest bonds of affection and mutual confidence; it simply means that Canada is grown up and is mistress in her own house. I have said something of our misleading forms; let me illustrate. We have a Governor-General who is the personal representative of the King. The Governor in the times of the Thirteen Colonies was an actual Governor, he actually governed and he was largely responsible to the Home Administration for the government of his colony. No bill could become a law without his assent and his personality and character were enormously important. Canada began that way but by a course of evolution, helped on its way by a little

rebellion, the power of the Governor has dwindled almost to zero. It is a matter of almost no importance who and what manner of man the Governor may be. The people every so often elect Representatives. The Ministers, ostensibly Ministers of the Crown, are responsible to these Representatives and once they lose the support of the majority of the Representatives the Ministers must go out of power. The Governor is the only man in Canada who can have no politics.

So, too, in form, the Governor may refuse the royal assent to a bill which has passed Parliament, but it is unthinkable that he would do so, except on the advice of the Ministry responsible to the people. Only once in sixty years has the royal assent not been given, and that was on the advice of the Ministry.

Until 1878, there were occasional interferences by Britain in our tariff arrangements. In that year Canada imposed a somewhat heavy duty on British as on other goods. When British manufacturers complained saying that this "National Policy" would imperil British connection, our Prime Minister in his place in the House of Commons at Ottawa said if that were so, "so much the worse for British connection." This has been called our "Declaration of Financial Independence," and it was effective.

In 1887 was formed the Colonial Conference composed of the Prime Minister of the United Kingdom and the Prime Minister of the self-governing colonies, to discuss questions affecting the whole British world. In 1907 it was seen that "Colonial Conference" was a misnomer. Canada and her sister Dominions had outgrown the colonial states; they were no longer "colonies" and the Conference took the name of "Imperial Conference," Conference of the Empire. Since that time, no responsible British

statesman has spoken of Canada as a Colony; and indeed, no one but Americans have done so, they apparently thinking Canada to be much in the same position as one of the Thirteen Colonies before the Revolution. In the meantime in 1897, our Prime Minister had served notice that Canada did not intend to submit to treaties in which she did not take part in making, as she did in the Washington Treaty of 1871.

In 1914 came the War and Canada delayed not a minute. The last man and the last dollar were offered and before the War was over, six hundred thousand Canadians were under arms—not to fight England's battles, Britain's battles, but Canada's battles—battles for righteousness and that the world might be governed by law and not by brute force.

The United States did not see matters in the same light. We Canadians have nothing to say about that; it is none of our business. Every nation must, in the nature of things, govern its conduct by intelligent self-interest and must be the sole judge of its own actions.

With sixty thousand Canadians dead, three times as many crippled, we do not repent. How far Americans agree with my friend Ed Howe, who in almost every issue of his monthly journal of indignation, girds against the entry of the United States into the War at all, I do not know, but we are all grateful for the splendid work of her soldiery. Before the War was over the War Cabinet was formed in 1917 composed of the Prime Minister of the United Kingdom and the Prime Ministers of the self-governing Dominions to decide how, where, and under whom all the soldiers under the Flag should fight and these Prime Ministers met on an equality. When the War was over, the Prime Ministers went each to his own nation to attend

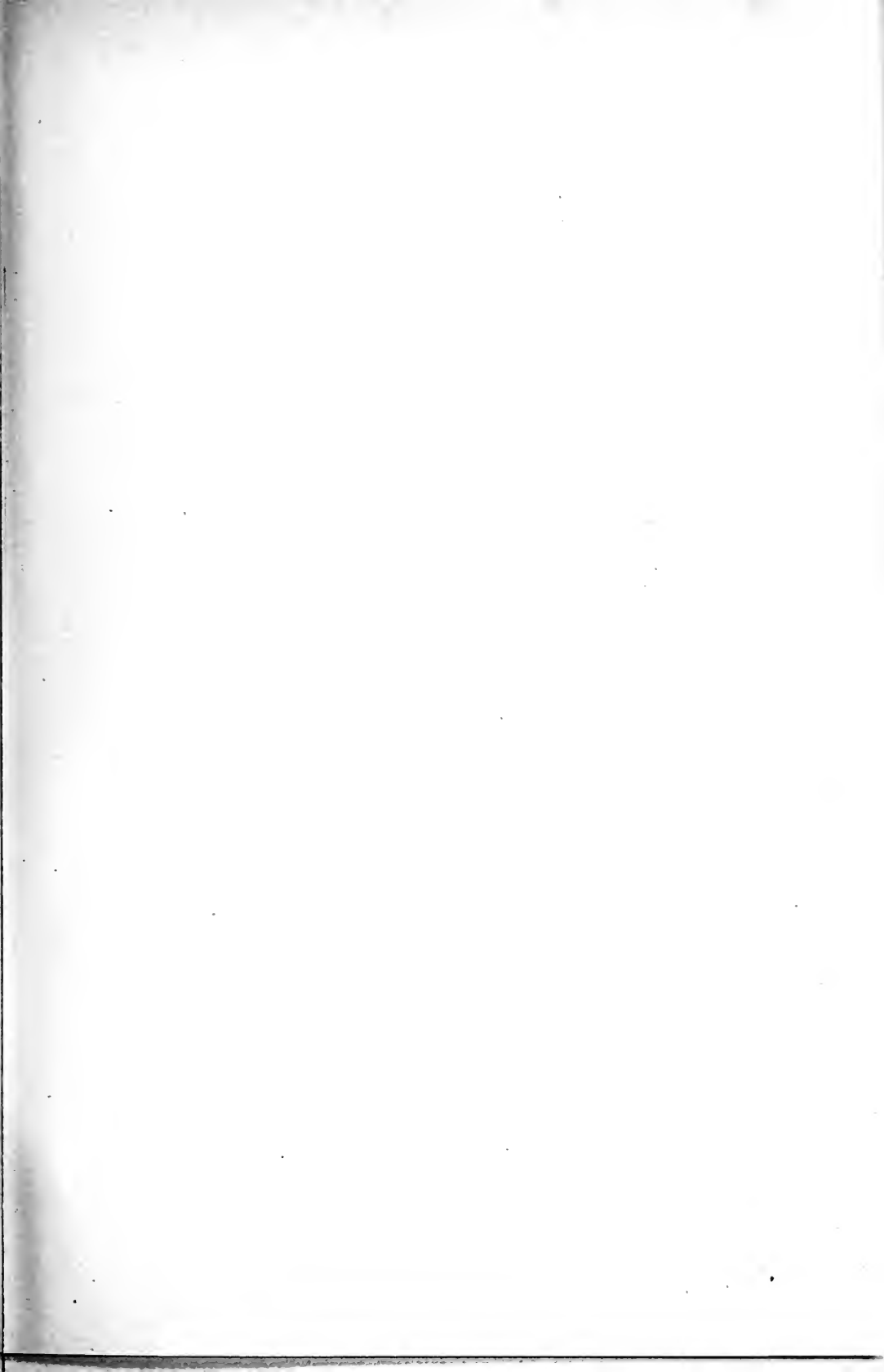
to that nation's business, enough for any one man to attend to.

Each separate nation of the British world signed the Treaty and joined the League for itself and in its own name. Each has had its representatives in the League of Nations; Canada's representative has been an efficient President; each has taken its own view of matters uninfluenced by the views of the others. Canada has strongly protested against Article X, much favored by the United Kingdom, and has declined so far to have anything to do with Locarno. As to whether this is wise or not I express no opinion—I simply state the fact. She is following and intends to follow her own views not the views of others, British or otherwise; she is no adjunct. I have no intention of advising the United States or its people on their course but I simply venture to say to them, "Whatever you do, do not be influenced by the baseless and absurd thought that Canada will or can be directed in her course by anything but her own judgment."

And in all this let no man imagine that Canada or Canadians have any feeling against England, Great Britain or the United Kingdom. We witness with some amazement and are puzzled at the rancour

shown in the United States against "England" (for it is always "England") for mistakes made by their common King a century and a half ago but we have nothing to complain of. The Mother Country spent her money unsparingly that Canada might live: she not only gave Canada all the rights Canadians desired when she knew that they were actually desired, she even urged Canadians to take rights and corresponding duties which they were unwilling to assume. Of course, there were conservative obstructionists and reactionaries from time to time—that is always to be expected—but in general, the Mother Country was more than willing that Canada should manage herself. One Bunker Hill was enough. Two daughters who had left their mother's home to manage houses of their own were asked, "Does your mother interfere with your affairs?" One said with a snarl: "You bet she does not—if she did, she would soon know where she got off!" The other said, with a smile: "Why, no, of course not. My mother taught me how to manage a household, and she would no more think of interfering in my affairs than I would think of interfering in hers." One does not need to consider long to recognize which daughter is Canada.







ANGLO-AMERICAN RELATIONS

By

WILLIAM RENWICK RIDDELL, LL. D., D. C., C. L.
JUSTICE OF THE SUPREME COURT OF ONTARIO
(Appellate Division)

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ANGLO-AMERICAN RELATIONS.

AN ADDRESS

BEFORE THE VERMONT STATE BAR ASSOCIATION, JANUARY 6, 1926.

BY THE HONOURABLE

WILLIAM RENWICK RIDDELL, L L. D., D. C. L., etc.,

JUSTICE OF THE SUPREME COURT OF ONTARIO,

(Appellate Division.)

The Seer of old launched his invective against those, from the prophet even unto the priest, who said, "Peace, peace" when there was no peace and warned that they should be cast down at the time the Lord should visit them;¹ but another,² mayhap a greater, foreseeing a time when the Spirit should be poured out from on high, is rejoiced that the work of righteousness shall be peace and the effect of righteousness quietness and assurance forever.

All history, all philosophy, cries aloud that there is no real peace when they "heal the daughter of my people slightly," superficially, having no great regard for the fracture (*suntrimma exouthenountes* as the LXX have it): in that case, the peace is superficial also—real peace in which the "people shall dwell in a peaceable habitation", is the work of righteousness alone whose efficient and perfect work is quietness and assurance forever.

When on the Fourth of July, 1776, the American Colonies sent out to a breathless world, that valiant Declaration of Independence of England and England's King—an event which last year in the historical Hall of Westminster, I heard the Lord Chancellor of Great Britain in addressing the lawyers of three nations³ declare the greatest event in British history for centuries

¹Jeremiah, VI, 14.

²Isaiah, XXXII, 16, 17, 18 (see the Septuagint Version).

³On the visit of the American and Canadian Bar Associations to England, July 2, 1924; Lord Haldane in Westminster Hall, Monday, July 21.

—it seemed as though this tortured world would never again find peace. On this side of the Atlantic were the determined men who for the support of the defiant Declaration pledged their lives, their fortunes and their sacred honor: on the other a King, sincerely religious and wholly conscientious, who believed that he was required in obedience to his sacred promise on Coronation Day and his duty to God who had entrusted him with the sceptre—to withstand every attempt to weaken the supreme authority of Britain, and not quailing before that “most daring spirit of resistance and disobedience,” which prevailed.⁴ There was a House of Lords, who appalled at “the most unprovoked rebellion ever known in the annals of this or any other country” by colonists who were “exceedingly ungrateful,” Colonists who from their first immigration from England “had manifested a most disloyal and republican spirit,” had by a vote of 82 to 26 expressed their “abhorrence of the desperate spirit of these overbearing men,” their insolent manner and arrogance: and assured the King of their sympathy and support in effecting his “paternal object of restoring (the) distracted Colonies to the happy condition from which by their own misconduct they are wretchedly fallen.”⁵ The House of Commons, resenting “the insolence of the chiefs of this Rebellion,” could “not forbear to express (their) detestation and abhorrence of the audacious and desperate spirit of ambition which (had) at last carried (the) leaders so far as to make them openly renounce all allegiance to the Crown . . . and in direct terms to presume to set up their rebellious confederacies for independent states”—

⁴The King’s Speech on opening Parliament, November 30, 1774: 18 *Parliamentary History*, Cols. 33, 34. Compare the Speech, October 31, 1776: *do.*, cols. 1366 8.

⁵Debate in House of Lords on the Speech from the Throne, October 31, 1776: *do. do.*, cols. 1372, 1373, 1392, 1395. The Noble Lords whose language is quoted were Lord Cardiff (eldest son of the Earl of Bute and later created Marquis of Bute) and the Earl of Derby. The Address itself was moved by the Earl of Carlisle and seconded by Earl Fauconbergh.

and by a vote of 232 to 88 considered it a duty to grant ample supplies to frustrate the audacious attempt.⁶

There were, indeed, many who advocated the American cause. If the "spirit which compelled the first settlers to fly from the ecclesiastical and civil persecution and oppression of a tyrant was a spirit of republicanism," more than one Lord "hoped that spirit would never be extinct here or there." It was openly said that the original object of the war was "to enslave three millions of British-born subjects," and "the people of America . . . were fully justified in declaring themselves independent": and many Lords looked "with the utmost shame and horror on any attempt that should tend to break the spirit of any part of the British nation, to bow them to an abject . . . submission to any power whatsoever, to annihilate their liberties and to subdue them to servile principles⁷." In the Commons, it was as openly said that the Americans were driven to their Declaration of Independence by persecution and "they had no other way of putting themselves on a footing (an equality) with us than by throwing off the yoke (and) declaring themselves independent". The "wicked war had been occasioned solely by a spirit of violence, injustice and obstinacy in our Ministers, unparalleled in history"—"They drove the Americans into their present state of independency," and "will never

⁶*Do. do.*, cols. 1397, 1398, 1431. The statement concerning a rebellious confederacy setting up for an independent state has a hauntingly familiar sound. Some of the Speeches in the House of Commons, October 31 and November 6, 1776, in opposing the Government might have been made with universal approval in the Continental Congress. Some might *mutatis mutandis*, have been made in Washington or Montgomery in 1861. The view openly expressed that the use of armed force against the "Rebels" was "unconstitutional" would be accepted in one place at least. Mr. Wombwell's censure of the "Americans as a bragging cowardly banditti" was not received with much favor: *do. do.*, col. 1402.

⁷*Do. do.*, cols. 1376, 1385, 1394.) The speakers were the Earl of Radnor and the Earl of Sandwich. Twenty six Peers joined in the Protest.

conquer (their) free spirit exerted in an honest cause," who "had done no more than the English had done against James the Second." The Ministers were adjured to recall their "fleets and armies from America and leave the brave Colonists to the enjoyment of their liberty."⁸

In the Thirteen Colonies, too, there was not unanimity—nearly all Americans knew that the rights of freeborn men were withheld from them; but no small number believed, even in the face of bitter experience, that these rights might be achieved by constitutional means—they thought liberty would be too dearly bought by rebellion and severance from their brethren across the sea, in what they still in deep affection called Home. These Cavaliers of the eighteenth century have fared hardly at the hands of most American historians.—these Tories have been held up to indignation and contempt—many of them, after the Peace of 1782-3, came to Canada and we call them United Empire Loyalists. Our own poet sings of them:

" They who loved
The cause which had been lost and kept their faith
To England's crown and scorned an alien name,
Passed into exile, leaving all behind
Except their honour
Not drooping like poor fugitives, they came
In exodus to our Canadian wilds;
But full of heart and hope, with heads erect
And fearless eyes, victorious in defeat"⁹

⁸*do. do.*, cols. 1402, 1404, 1407, 1427, 1429. The speakers were Governor Johnstone, John Wilkes, Colonel Barré and Charles James Fox. I should like every American who thinks he has cause to hate "England" to read this and other Debates in Parliament about this time. He will see that the real offenders were not "England" or "The English" but a stupid, arrogant and intolerant Ministry with an ill educated, ill-regulated, ill-balanced King. There is no room for rancor against the nation.

I do not here make any Apologia for these "Tories"—but all will admit they were *men*.

Bitter strife, bloodshed, tears and death, there were in America for five years and more. Peace came at last, and there were thence forward two English speaking nations. The old British Empire built much on the model of the old Roman Empire had been rent in twain never to be rehealed, but the spirit was not dead—she had "dotted over the surface of the whole globe with her possessions and military posts," her "morning drum-beat following the sun and keeping company with the hours" circled "the earth with one continuous and unbroken strain of the martial airs of England."¹⁰

The young Republic rich in potential if poor in actual and realized wealth, exultant in her freedom wrought out by her own valor, like her own eagle soaring to the sun, had her proud face set, prepared for every fate, trusting in the prowess which had humbled a mighty world-empire—and there stood Canada ardently urged to be the Fourteenth¹¹ Colony to join the Thirteen in forming a new nation, but standing firm in her allegiance.¹²

There had been much ignorance geographically in the Commissioners who drew the Treaty of 1782: the descriptions in the

⁹William Kirby: *The Hungry Year*: Methodist Book and Job Printing Establishment, Toronto, 1879, See my *William Kirby*, Toronto, 1923, pp. 97, 98, 169.

I make no attempt to estimate the relative number in the Thirteen Colonies, loyal to Britain in 1776; the estimates seem to run from one fourth to two-thirds.

¹⁰Daniel Webster's Speech. *The Presidential Protest*, May 7, 1834.

¹¹See Prof. Justin D. Smith's *Our Struggle for the Fourteenth Colony*, Putnam's, New York and London, 1907—two volumes.

¹²See my Articles, *Benjamin Franklin and Canada* and *Benjamin Franklin's Mission to Canada and the causes of its Failure*: 48 Pennsylvania Magazine (1924) pp. 97, 111, *sqq.*

Treaty of the boundary between the territory of the United States and that of Britain were in many cases ambiguous and the line was for hundreds of miles uncertain.

Some of the States had prevented the collection by British creditors of American debts, in direct and open contravention of the plain words of the Treaty: Britain, retaliating, kept possession of the Posts on the American side of the boundary: slaves had been taken away by British forces from American masters and showed a reluctance to return to the land of the free, while Britain refused to give them up or to pay for them—scores of thorny questions were toward, any one of which might have caused war; and it is not too much to say that the world looked on to see what these two peoples, would do and expected that ere long they would be at each others throats.¹³

There were hot heads on both sides—Mad Anthony Wayne talked belligerently in the West and Lord Dorchester like a fool in the East—it is true that Wayne quieted down and that Dorchester explained that he had to talk that way to impress the Indians. A strong party made its demand for war heard many times and oft at Philadelphia; but George Washington would have none of it—he had had enough of war and he sought the way of peace—and that he knew depended on righteousness.

He sent to London, John Jay, Chief Justice, a profound lawyer with a profound sense of justice: he found in London the same kind of men as himself, men who like himself followed the precept of the Apostle to “seek peace and ensue it”¹⁴

But scant appreciation has been shown of these men, little praise have they had; nevertheless they were the pioneers in modern international arbitration and laid the foundations of

¹³I had almost said “sassy”; but feared that that expressive word might not be understood by my highly educated audience.

¹⁴1 Peter, III, 11.

Anglo-American dealings broadly, deeply and permanently on principles of justice and righteousness.

Repudiating the age-old doctrine, out worn within the nation but flaunting its hideous boasts as between nations, the "good old rule" as it was called. ".the simple plan that they should take who have the power, and they should keep who can,"¹⁵ a plan that reeks of the bottomless pit, they determined that the matters in dispute which could not be settled by diplomacy should be settled by the adjudication of independent arbitrators.¹⁶

Britain refused to so much as consider paying for slaves, but other matters of dispute were calmly discussed; and when the parties failed to agree, an amicable method of settlement was arranged.

I can mention only a few of the arrangements:

There was a dispute concerning the Northeastern boundary of the United States.

The Treaty of Paris, 1783, had made boundaries of the River St. Croix and a line drawn due north of the River St. Croix to the Highlands, then along the Highlands to the northwesternmost head of the River Connecticut. Geography has a way of laughing at diplomats; and here she played one of her usual jests.

There were three Rivers with more or less barbarous names, any one of which might be called the St. Croix, the Magaguadavic and the Schoodiac (Schoodic or Scoodiac), the latter dividing into two branches a few miles from its mouth. Of course Britain claimed the west limb of the Schoodiac—that was the River farthest west, and equally of course, the United States claimed the Magaguadavic, for that was the farthest east.

¹⁵Wordsworth, *Rob Roy's Grave*.

¹⁶Jay has never received due credit for his achievement—in his lifetime he was execrated—he of whom Daniel Webster said: "When the ermine of justice

Surely now, here was something to fight about—hear ye not the Eagle scream? the Lion roar? “What we have we hold,” “Not one foot of American soil will we give up”—patriotism rampant, common sense forgotten. These degenerate statesmen—Washington and Jay amongst them—did not fight—they appointed arbitrators instead. Britain appointed Colonel Thomas Barclay, American born, and a former student of Jay’s, who had kept his faith to England’s Crown and been driven from New York to Nova Scotia where he was peacefully practising law—the United States, David Howell, a citizen of Rhode Island who had been Attorney General of his State, a Judge of her Supreme Court, a professor of Law in Brown—two lawyers, not two swashbucklers, whose appointment indicated that both Governments wished a determination, based on law and right.

It was provided in Jay’s Treaty that these two should agree on a third (with elaborate provisions, for the selection of the third, if they could not agree.) When the actual selection of the third came to be made, Howell suggested Egbert Benson, a native of Barclay’s own Province of New York, a graduate of King’s College

fell on John Jay, it touched nothing less spotless than itself” was charged with having sold his country to Britain (This however, seems chronic; I see my late friend Walter Hines Page called more an Englishman than an American) The latest work on Jay’s Treaty. Prof. Samuel Flagg Bemis’ *Jay’s Treaty, Knights of Columbus Historical Series*, MacMillans, N. Y., 1923, is *me judice*, not only not generous but also very unfair to Jay. Perhaps some day some American will do justice to this great man Jay who lost the great prize on which he had set his heart, the Presidency of the United States. In 1789 he had 9 votes, 5 from New Jersey, 3 from Delaware and 1 from Virginia, Washington had 69; in 1797, after the Treaty, he had 5 votes from Connecticut: in 1801, he had 1 vote from New York: and though he survived till 1829, he received no more votes in the Electoral College. He, however, was elected Governor of New York during his stay in England, and in 1793, was reelected in 1799: he declined re-nomination as Governor and also reappointment as Chief Justice of the United States by Adams.

(now Columbia) and first Attorney General to the State, Howell also suggested the names of two or three gentlemen in England. Barclay accepted the American—Why? you ask—He gives his reason—because he wanted “a cool, sensible and dispassionate third Commissioner.”

Does not that one statement throw a beam of glorious light upon the honesty, the sense of honor, the desire for justice and fair dealing not only of those two Commissioners but also of the nation who appointed them? It is that spirit which has animated these peoples and directed their international relations for more than a century.

The Commissioners made a unanimous award at Providence, R. I., in 1798—that it was in favor of the British contention is a matter of detail—that it was made and how it was made are all that really count.

But suppose the Commissioners had not agreed, would there have been war? Not with Washington alive—that great man by reason of his policy toward Britain and his desire for peace had been “roundly abused in terms scarcely suited to a Nero, a notorious defaulter or even a common pickpocket;”¹⁷ but he had not, even in retirement, lost his hold on the American people. Nor, indeed, could war have ensued at any period of American history if we exclude the frenzied Second decade of the Nineteenth Century when all the world seemed to have gone mad.¹⁸ Let us see what happened when arbitrators were unable to agree.

¹⁷To avoid the very appearance of a partial view, I here quote from an American work *The Americana*, vol. XX, *supra* *loc.*, Washington, *ad fin.* (written by Professor Van Tyne of the University of Michigan).

¹⁸An American to whom I once said this, thought we should also exclude what he called “The Wildest times of Theodore Roosevelt”—that, however I more than doubt—I knew Roosevelt somewhat intimately and I am sure that with him war would have been the last resort, however, he might threaten.

The Treaty of Paris as we have seen, made the boundary line run along the Highlands—i. e., the separating line between the waters flowing into the St. Lawrence and those flowing into the Atlantic. Where was this line? It could not be identified. As early as 1802, the matter had been taken up by the two Governments, but no conclusion had been arrived at before the outbreak of the fratricidal war of 1812. When that indecisive and useless war was over, leaving the question “as you were,” the Treaty of Ghent left the determination of the line to two Commissioners, one to be appointed by each Power. Britain appointed Thomas Barclay whom we have already met: the United States, Cornelius P. Van Ness, a native of New York but then a citizen of Vermont of which he was to become the Governor and Chief Justice. They could not agree; and the Treaty had not provided a third Commissioner—in 1821, the disagreement was reported, but no one thought of war. The Treaty had provided for a disagreement, and in such case the matter was to be referred to “a friendly Sovereign or State.” This was not at once resorted to; but Maine which had become a State in 1820 and New Brunswick which had become a Province in 1784, kept quarreling; and at length after a particularly acute difference over the arrest of John Baker, a Convention was entered into in 1827 at London to refer the matter under the Treaty of Ghent. Next year, William, King of the Netherlands, was chosen¹⁹ and he agreed to act: in 1831, he made his award. The United States promptly and properly refused to accept the award on the ground claimed to be unexpugnable that the Arbitrator had not passed on the matter submitted to him—*secundum materiam subjectam*, to use the legal terminology—he had been appointed to find where the line actually was, he said he could not determine this, but he had found where in his opinion it was suitable it should be. The British Government did not insist:

¹⁹Some have sardonically conjectured that he was chosen because as King of the Low Countries he would know nothing about Highlands.

further negotiations were entered unto, offer and counter-offer made, the "Restook War"²⁰ broke in 1838-39, checked by General Scott; and finally in 1842, Webster and Ashburton settled the dispute by the peaceful ways of diplomacy.

This line was and is exceedingly awkward for Canada, an elbow of Maine sticks up into her ribs, and her Intercolonial Railway has been compelled to make a long detour to avoid American territory, while there is no corresponding advantage to the United States. But the line was agreed upon and the matter is settled.

This controversy illustrates, it seems to me, our manner of thought. The boundary as defined by the Treaty of 1783, neither party at any time attempted to get away from: "Scrap of paper" as it was, it was a contract, and therefore sacred and binding. When it was found that the words employed were not sufficiently definite to make clear the precise boundary intended, there was still no threat of war, much less, of forcible entry. Two Commissioners were selected, lawyers of eminence, to find out exactly what was meant. They disagreed—a disagreement which might quite naturally arise from national feeling and prejudice: it was left to a foreigner—a foreigner in such high position that no thought of corruption or dishonesty could arise. His award was claimed by the United States as not having been made on the proper basis. Britain, in view of this claim, instead of insisting on the award (as possibly, technically she might), agreed to disregard it. I have thought that her conduct on this occasion may well be likened to that of the United States a few years ago. Britain claimed that the United States had bound itself not to give any advantage to its own ships in the Panama Canal; the United States took another view of the treaty, and made regulations by which certain ships of

²⁰Of the Aroostook or "Restook" War, it was said, probably unjustly that one was afraid and t'other dasn't—both parties acted with judgment and common sense, insisting on their rights but not proceeding to extremes the "Anglo Saxon way."

the United States had an advantage. But on consideration of the view taken by Britain of the treaty, it reversed its action and without assenting to the validity of the British contention, acceded to it because the other party to the treaty thought that was what the treaty meant; nor was the plea of change of circumstances, earnestly pressed as it was, even listened to. May I, as one who knows something of the American people, say that to my mind you never rose to a higher plane of international good faith than when you said to Britain, "You thought we meant that, so let it be?" But as a Briton, I venture to point to a precedent for this action, eighty-five years before, little known and little thought of.

One school of politicians would say that both the nations were fools. What say you?

There is not a mile of all the long international line which has not been in dispute, not a mile but might have caused a war.

Let us start at the East.

Down in Passamaquoddy Bay there were some Islands claimed by both the Province of Nova Scotia and the State of Massachusetts, a splendid chance for war for "inalienable national territory." The true ownership depended upon the interpretation of the Treaty of 1783; and the two governments determined to leave the matter to two lawyers. Thomas Barclay was one—him we have already met; the other, John Holmes, who had served several terms in the Massachusetts Legislature, and who was, after Maine was in 1820 admitted as a State of the Union, selected to represent her in the United States Senate. These two, like sensible men, gave up each a part of his individual opinion, and divided the Islands, giving Moose, Dudley and Frederick Islands to the United States and the rest along with the Grand Manan to Nova Scotia. No word of complaint has ever been heard raised against the decision unless we are to credit the story that President Taft thought a few years ago that it would have been infinitely better had Moose Island not been awarded to the United States.

Then the boundary of the Great Lakes was not quite certain; and again Commissioners were appointed to settle it. Anthony Barclay (son of Thomas, whom we have met), took the part of British Commissioner in the place of John Ogilvy, of Montreal who died at Amherstburgh, Upper Canada, from a fever contracted in the discharge of his duties. Peter Buel Porter, who had practised law at Canandaigua and afterwards had been a very competent commander in the War of 1812 and who was to be Secretary for War in John Quincy Adams' cabinet, was the other. They made an award at Utica, in 1822, wholly satisfactory then and now to all parties.²¹

This was by no means the end of the territorial disputes.

The international boundary was, indeed, settled by Commissioners at the east and through the Great Lakes and international rivers, through the Lake of the Woods. In 1818, from the Lake of the Woods to the Rocky Mountains, the parallel of 49°, N. L. was agreed upon through diplomatic means; but west of the Rockies, the line was in dispute. Britain claimed as far South as the mouth of the Columbia River, between 46 and 47°, N. L., the United States as far north as 54° 40'. The Convention of 1818 allowed the citizens of each nation to settle in the disputed territory. Attempts were made in 1823 and 1826 to fix the line, but in vain. In 1827, the arrangement as to settlement by either people was renewed indefinitely. Polk's election was fought on the slogan "Fifty-four forty or fight." Polk was elected, but no fight came on, although Britain firmly refused to assent to fifty-four forty. In those days and in that country, pre-election pledges were not invariably implemented, as of course they are in our day and in our land. Both parties thought it better to compromise and (in 1846),

²¹This is not quite accurate: There was for a time dissatisfaction in Upper Canada with some parts of the Line in the River, giving certain Islands to the United States; but no complaint has been made for nearly a century.

they agreed that the line of 49° N. L. should be extended to the Pacific. Of course the jingoes on either side were outraged, each government was charged with craven submission to unjust demands of the other; true national feeling was again dead and the doom of the empire—or the republic—was sealed. The story is told—I do not vouch for the truth of it—that Pakenham, the British Ambassador at Washington found that the salmon in the Columbia River would not rise to a fly, and thenceforward considered the river of little value.

Even yet the whole trouble was not got rid of. The Treaty of 1846 had fixed the line at 49° “westward to the middle of the channel which separates the continent from Vancouver Island, and thence southerly through the middle of the said channel and of Fuca’s Straits to the Pacific Ocean.” Geography again laughed at diplomacy. There were three channels, any of which might fairly be called the main channel. Britain claimed that nearest the mainland, the United States that nearest Vancouver Island; and the intervening islands were the bone of contention. In 1869, it was arranged to leave the dispute to the determination of the President of Switzerland, but the Senate refused to agree—the irritation which arose during the Civil War had not been allayed, and assuredly the way of the neutral, like that of the transgressor, is hard. British subjects settled in San Juan Island; General Harney landed an armed force and took possession of it for the United States; Britain had Men-of-war available, and only prudence and forbearance prevented an armed conflict. But though war was terribly near, there was no war; a peaceful joint occupation was agreed upon, and in 1871, by the Treaty of Washington, the Emperor of Germany was asked to decide the channel. This he did the following year in favor of the United States, and Britain withdrew.

They came the last dispute as to territory. The boundary of Alaska was for some time in doubt: joint surveys agreed upon in

1892 did not satisfactorily determine the true line, for it was not a matter of surveying. At length, in 1903, the determination of the boundary was left to six "impartial jurists of repute" who made an award in the same year. The award was not received with much favor in Canada; much complaint was made that some of the American Commissioners were not "impartial," and that the award was not in fact judicial.²²

But what of it? We had agreed in advance to accept the award and

A Scrap of paper where a name is set
Is strong as Duty's pledge or Honor's debt.

We exercised the right of freedom to "kick;" but we did no more.

We did object to such a Board and the award made by that Board; but there never was a thought of disputing its validity or of refusing to be bound by it.

So we have fixed our four thousand miles of boundary without a fight, without the effusion of one drop of blood, and almost without even the lingering remains of a temporary irritation.

²²I do not here discuss the justice of Canadian complaint. Those interested cannot do better than read the account of Hon. John W. Foster, who was the agent of the United States on this occasion. In his "Diplomatic Memoirs", 1910, Vol. II, pp. 197, 198, he says: "The Canadian government complained * * * that the members nominated by the President * * * were not such persons as were contemplated by the treaty, to wit: 'impartial jurists of repute' * * * It was alleged that one of the American members had expressed himself publicly some time previous to his appointment as strongly convinced of the justice of the claim of his Government. It was also objected that no one of the three was taken from the judicial life and that they all might be considered as political, rather than legal, representatives of their country. The editor of Hall's International Law (Edit, 1904), refers to the selection of the American members as a serious blot on the proceedings.' " Mr. Foster does not attempt to justify the act of the President. Mr. Lodge in his recent volume says that John Hay vigorously protested at the appointment—all honor to a great American.

Then the rights in respect of fishing have been in dispute—there was diplomacy in 1818 and 1871. The Halifax award in 1877 of five and a half million dollars startled the United States—there was talk of not paying, but the amount was paid within the time allowed by the Treaty of Washington.

Along with these, we had the Paris award in 1893 concerning the Seal fishery: the Hague decision in 1910—everything amicably settled.

Money claims have been many and perplexing. Let me mention but two. Britain was in 1793 still holding on to the Border Posts claiming that her nationals were not able legally to collect their American debts, as had been agreed by the Treaty of 1783—the United States even under the Constitution of 1787 could not interfere with the “Sovereign States”—Jay took the bold course of undertaking that the United States itself should pay these debts if Britain gave up the Posts—Britain did so in 1796; and, in 1802, the United States paid \$2,664,000 for British creditors of private American debts.

Now for an example on the other side:

A very curious dispute arose over one of the terms of the Treaty of Ghent. By Article I, it was agreed that all territory taken should be restored, without carrying away of slaves or other private property. Many slaves had come within the British lines, attracted by a Proclamation which virtually promised them freedom. (It may be remarked *en passant* that it was this conduct of the British commanders which came in for the bitterest comment by Americans, especially those of the South.) These quondam slaves had accompanied or preceded the British forces in their abandonment of American soil; and it was demanded that they should be returned or paid for. The British claim was a perfect example of legal hair-splitting, worthy of a special pleader, but it was *in favorem libertatis*, and a plea of that kind, like a plea *in favorem*

vitae, has always been looked upon with favor in English-speaking Courts. There was never any thought of delivering up the poor blacks; but the question of obligation to pay for them was an open one. It was finally left to the Czar of Russia, and he determined in favor on the contention of the United States.

Partly by arbitration of four Commissioners, and partly by diplomacy, the amount was fixed at about a million and a quarter dollars. That sum Britain paid and kept the negro.²³

The Alabama Award is but the most striking of monetary claims settled by peaceful means.

But once has our peace been broken in the century and more of close intercourse.

A long series of years of peace and friendship—broken indeed from time to time by misunderstandings and quarrels—but these were family quarrels and no one's business but our own—made the English speaking peoples on this Continent look upon themselves and each other as almost one.

Sentiment? Yes, sentiment if you will but not all sentiment—I read but the other day in a financial article—Finance notoriously knows no sentiment—that American financiers when they take American Bonds are satisfied with the promise of their Government but require before accepting foreign Bonds that a fund should be set apart as a mortgage to repay them—and “in this respect British and Canadian bonds are not considered foreign by American investors, or the American People.” What does that mean? International honour, honesty, fair dealing for generations.

²³I have always been proud of this chapter of history—we in my Province which is the first in all English-speaking countries (and in the whole world behind only one country and that by but a few months), to abolish slavery, ought to be able to appreciate the conduct of the Mother Country in paying such a sum rather than send unfortunates who had trusted her, back to the house of bondage.

It is that feeling on either side of confidence in the desire of the other to act honorably, honestly, fairly, that has enabled the Pax Anglo-American, to prevail for over a century and which will, please God, cause it to prevail for many centuries—ad multos annos, yea, in aeternum.

A little more than nine hundred years ago, in August, 1023, upon the banks of the Meuse met Henry, Emperor of the Holy Roman Empire, and Robert the Pious, King of France, with “dukes and satraps of all nations, illustrious bishops and abbés”—the monarchs swore eternal friendship and proclaimed a pact of peace and justice for the two nations and, therefore, for the civilized world—they agreed that an Oecumenical Council should sit under the Pope Benedict VIII. But the next year died the Pope, and then the Emperor; and all was over with the general peace which King, Emperor and Pope had dreamed of imposing upon Christendom. The Popes tried from time to time for Pax Dei, but the Kings were not to be restrained—no Papal Pax Dei, no Pax Romana, was fated to succeed.

What could the Pax-Anglo-Americana do? One might have thought that the example of two such nations, so powerful that they need fear no foe, with that chastity of honor which feels a stain like a wound, might have been followed by any nation however powerful, however proud. It was not to be: the Kings were not to be restrained: largely because of royal and official arrogance and pride, war again deluged the earth, and 60,000 Canadians and as many Americans lay slain.

But “the Captains and the Kings Depart”: arrogant Emperors are dead or in exile, the military officer may still swagger but no one bows down before him, the common people have come into their own and now at length common sense has a chance—common ordinary business principles are considered preferable to boastful defiance, and the nation which without squealing pays its honest

debts is honored more than that which talks of its glory and self sacrifice, past or present—but fails to make a remittance.

In some way, Pax Anglo-Americana must prevail or chaos is come again. Is it to be The League of Nations? or any League of Nations? the World's Court, or any World Court? or is some other means to be evolved? I know not. But this I know—some means must be found to end war, or war will end civilization. The nations must be taught or they must be forced to settle their disputes in the Anglo-American way, the democratic way—for another settlement in the old way, the autocratic way, spells destruction and woe unutterable.

The hope of our form of civilization lies in the harmonious collaboration of the English speaking peoples—we know each other and understand each other; for truly we come of the blood. Even after Locarno, France watches her northeast boundary: Germany, we cannot wholly trust for generations, and until the virus of vicious imperialistic teaching is bred out: Italy, Russia have their own internal problems which call out all their energies: Spain is negligible: Austria, the new nations of Mid-Europe, the Scandinavian nations, what can they do? Who will come to the help of the Lord, to the help of the Lord against the mighty? Who will escape the bitter curse of Meroz? The weary—nay, the unwearied Titan, who has borne for generations the White Man's Burden, the young and vigorous Giant who said to Spain: "Cuba must go free" and to the nations of Continental Europe: "Hands off America."

With these two rests the destiny of the world: together we stand, and the world stands secure: divided, we fall, the whole fabric of civilization falls and great will be the fall thereof. Our union depends not on the words of Kings but on the hearts of the people with whom remains the fate of the world. What are lawyers, what are you to do about it? Are they, are you to seek peace and ensue it? This is not always easy:

War
I abhor
But oh! how sweet
The sound along the marching street
Of drum and fife—and I forget
Wet eyes of widows and forget
Broken old mothers and the whole
Dark butchery without a soul.

The poetry, the glamor, the romance of war, are part of our common heritage: we are fighting animals by instinct and our literature is full of battles. Peace is dull, drab and without bright color—the bayonet flashes more brightly than the scythe and khaki looks better in the uniform than in overalls: but all this must be surmounted—the innate desire to fight derived from millions of fighting ancestors—the Old Adam of the Scriptures must be overcome by reason, ancestral hatred and rancor must cease or Hell will be again triumphant.

Are you, nay! are we to hear the commendation of the Master: “Blessed are the pacemakers for they shall be called the children of God!” By some human means will come about what the Prophet long ago foresaw:—“they shall beat their swords into ploughshares and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more”—for “the Government shall be upon his shoulder and his name shall be called Wonderful The Prince of Peace.”

Peace may not be assured in our day; but we can do our share in the work. And whatever may be the case with other nations, yours and mine have definitely decided that between us there can be no occasion of war. The remains of the ill feeling and misunderstanding occasioned by the egregious folly of an honest but half insane and badly educated King with his insane Ministry have been washed out by the blood shed in common by our boys in the

cause of law, justice and right. We equally realize that the greatness of our two nations does not lie in mighty armies, overwhelming navies, not even in shipping or commerce on every sea or goods in every mart—these indeed have their place but it is Righteousness that exalteth a nation. Each having full confidence in the sense of right of the other, we stand together and if need be will march together and fight together—a true union in spirit, in inspiration and in object. I may again be permitted to apply to that union the splendid language of your own poet the pride of New England.

Sail on, O Union strong and great!
Humanity with all its fears,
With all its hopes of future years,
Is hanging breathless on thy fate:
Sail on, nor fear to breast the Sea!
Our hearts, our hopes are all with thee
Our hearts, our hopes, our prayers, our tears,
Our faith, triumphant o'er our fears
Are all with thee—are all with thee."



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THE SLAVE IN ENGLAND.—It was no idle boast of William Cowper's—

"Slaves cannot live in England; if their lungs
Receive our air, that moment they are free"—

but that was in 1783, more than a decade after Lord Mansfield had said in the case of the Negro, James Somerset: "The air of England has long been too pure for a slave and every man is free who breathes it." Little more than two centuries before another, Somerset had totally falsified the saying.

On January 21, 1547, the Crown of England devolved upon a nine-year-old boy, Edward, the son of Bluff King Hal, Henry VIII, and Jane Seymour. Well educated and of good parts as he was, he was quite too young to take an active part in the government and legislation of the land of which he was King in name—that was in the hands of his uncle Edward Seymour, Earl of Hertford, who became Duke of Somerset before Parliament met, November 4, 1547.

By that Parliament wholly under the control of Somerset, was passed one of the most curious of Statutes, "An Act for the punishing of Vagabonds and for the reliefe of the poore and impotent persons."¹

The Statute recites that idleness and vagabondery is the mother and root of all thefts, robberies, and all evil acts and other mischiefs and that the number of people given thereto in the Kingdom has always been large; that all the King's noble progenitors and the High Court of Parliament had often and with great travail gone about and essayed with godly Acts to repress; yet until this time it had not had the wished for success partly by foolish pity and mercy of those who should have seen the said godly Laws executed and partly by the perverse nature and long accustomed idleness of the persons given to loitering: and "idle and vagabond being unprofitable members or rather enemies of the Commonwealth have been suffered to remain and increase and yet so do, whom if they should be punished by death, whipping, imprisonment and with other corporal pain it were not without their deserts, for the example of others and to the benefit of the Commonwealth—yet if they could be brought to be made profitable and do service, it were much to be wished and desired."

The statute then repeals all previous statutes and acts of Parliament for the punishment of vagabonds and sturdy beggars. Then follow the slavery clauses. It is enacted in effect that every one, man or woman, not too lame, impotent, or old to work, and not having lands, etc., sufficient to support him, who shall wander round

1. Statutes at Large, London, 1786, Vol. X, Appendix, p. 139, the statute is (1547) 1 Edw. VI, c. 3. I shall modernize the spelling.

without work for three days or more without offering themselves to labor with anyone who will take them "according to their faculty," shall be on proof before two Justices of the Peace ordered to be marked with a hot iron in the breast with V, and delivered to the prosecutor "to be his slave to have and to hold the said slave unto him, his executors or assigns for . . . two years." And the new master is to be ordered "to take the person adjudged to be a slave with him and, only giving the said slave bread and water or small drink and such refuse of meat as he shall think meet, cause the said slave to work by beating, chaining or otherwise in such work and labour (how vile soever it be) as he shall put him to." If the slave ran away or stayed away from his master for fourteen days, the master might retake him and punish the fault by chains or beating, and two Justices were to cause him to be marked on the forehead or the ball of the cheek with an hot iron with the sign of an S and adjudge him to be a slave forever. If he ran away or absented himself a second time he might before the Justices of the Peace in General Sessions be convicted as a felon and "condemned to suffer pains of death as other felons ought to do."

Not only were vagabonds and sturdy beggars legislated against, but also clerks in Holy Orders—such clerks being convicted of crime were no longer to be allowed to make their purgation and immediately set free. A clerk when convicted was to find a man (the Act wisely says "if he can") who will be bound with two sufficient sureties to pay to the King £20 to retain the convict as a slave and not to let him go abroad or at large for a year and the convict was to be delivered to the person so becoming bound as his slave for a year—with the same penalties (except burning in the breast) as in the case of the vagabond. If the convicted clerk could not find any person to become so bound, he had to stay in prison for a year and then make his purgation and be set free.

If a clerk could not make his purgation, instead of his remaining in prison during his life, any one might become bound to the King as in the case above mentioned and take him as a slave for five years. The masters of such slaves might "let, set forth, sell, bequeath, or give" the service of their slaves like any other moveable goods or chattels.

A slave wounding his master or during or after the term of slavery conspiring to kill, wound or beat him or burn his house, barn, etc. (if the conspiracy come to an overt act as lying in wait, etc.), shall be condemned to death unless the master will take him as a slave forever.

There are many other provisions in this extraordinary statute, but the above will suffice if one more be added. Section XVI provides that if any aged, maimed, or impotent parishioners be not so lame and impotent "but they may work in some manner of work," then "if they refuse of wilfulness or stubbornness to work or run away and beg in other places," they might be punished "with chaining, beating, or otherwise." Moreover, "be it enacted . . . that every Sunday and Holiday after the reading of the Gospel the

Curate of every Parish do make (according to such talent as God hath given him) a godly and brief exhortation to his Parishioners, moving and exciting them to remember the poor people and the duty of Christian charity in relieving of them which be their brethren in Christ, born in the same Parish and needing their help."

This drastic Act failed of its object and, 1549-1550, by the Act 3, 4 Edw. VI, C. 16, it was "utterly repealed, made frustrate, void and none effect" and the former Act of 22 Henry VIII renewed.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto, Canada.

SIR MATTHEW HALE AND WITCHCRAFT

HONORABLE WILLIAM RENWICK RIDDELL¹

The scepticism of Mr. Justice Powell^{1a} expressed at and after the trial before him at Hereford, March 4, 1712, of Jane Wenham of Walkerne for Witchcraft (which was the last trial and conviction for Witchcraft in England) excited the greatest indignation of many good people in England, who honestly believed that the authority of Scripture and the very foundations of religion itself were being undermined by the Sadducism of the Judge and those who thought as he did—particularly when she was not executed after being convicted.

And, indeed, there was ample ground for this feeling on the part of the unthinking followers of bygone traditions and too literal interpreters of the Scriptures.

Must not one who disbelieved in the very existence of Witchcraft be, *ipso facto*, a disbeliever in the Old Testament and the New? In the Old Testament is the Divine command "Thou shalt not suffer a witch to live": Exodus, XXII, 18; and in Deuteronomy, XVIII, 10, 11, it was forbidden that a witch or a consulter with a familiar spirit should be found amongst God's people: in the New Testament, Simon Magus practiced Sorcery and bewitched the people; Acts, VIII, 9; not only was Witchcraft wholly banned by St. Paul in Galatians, V, 20, but Sorcerers were, in Revelations, XXI, 8, given their place in the Lake burning with fire and brimstone along with murderers and the unbelieving.

¹LL.D., D.C.L., &c., Justice of the Supreme Court of Ontario.

^{1a}This Mr. Justice John Powell (1645-1713) must be (as he is not always) distinguished from his namesake (1633-1696) who was removed from the Bench in 1688 for giving his opinion that King James II's Declaration of Indulgence was a nullity. They both were distantly related to our Chief Justice, William Dummer Powell.

This Powell was a Member of the Inner Temple: He is best known for his "shameful" remark at the trial of Jane Wenham for Witchcraft. She was charged with being able to fly and the Sadducee of a Judge said: "You may—there is no law against flying."

After the conviction the Judge exerted himself in her behalf and obtained her pardon. She was thereafter supported in comfort till her death in 1730 by the kindness of Col. Plummer and after his death, of Earl and Countess Cowper. Her funeral sermon, convicted Witch as she was, was preached by the Rev. Mr. Squire, 60 *Dict. Nat. Biog.*, p. 563.

There were no more prosecutions for Witchcraft in England but some supposed Witches have been mobbed and a few murdered—the last Witchcraft prosecution in Scotland was in 1722—but the Statute of 1 Mary remained in force in England until the repeal in 1736 by 9 Geo. 2, c. 5.

It was not to be wondered at that the conservative Christians who were for preserving the ancient landmarks, were greatly perturbed. And the law expressly recognized the existence of the crime of Witchcraft. As early as 1541, the Statute of 33 Henry VIII, c. 8, punished Witchcraft and Sorcery with death without benefit of Clergy—and the Royal Witchfinder, James I, was gratified by a similar Statute (1604), Jac. 1, c. 12.²

The great authorities to whom appeal was generally made for the orthodox view were Sir Matthew Hale in law and Sir Thomas Browne of Norwich in medicine—and the comments by some of the supporters of the modernist view on the case of Jane Wenham coupled with the scarcely veiled scepticism of Mr. Justice Powell induced the publication in support of the traditional view of an account of the celebrated Witchcraft case in which Hale and Browne both figured. A 12 mo. six-penny pamphlet published by the well known E. Curll "at the Dial and Bible against St. Dunstan's Church in Fleet Street" was issued in 1712 under the title *Witchcraft Farther Display'd*,³ along with an account of Jane Wenham since her condemnation and also an account of the trials in 1661 at Cork of Florence Newton; this contains an abstract

²The Statute of (1541) 33 Hen. VIII, c. 8, made it a Felony to practise Witchcraft, &c., to get money or to consume any person in his body members or goods—this was repealed in 1547 by 1 Edw. VI, c. 12 and in 1553 by 1 Mar., Sess. 1, c. 1: but in 1562, Parliament not only legislated against "Fond and Fanatical Prophets" but also made Witchcraft a Felony; 5 Eliz., c. 16. When the "Royal Witchfinder" came to England as James I, the Elizabeth Statute was repealed but a more stringent one was enacted (1604) 2 (*Vulgo* 1) Jac. 1, c. 12.

See 3 Co. Inst., cap. VI, pp. 43, *sqq.*, for the earlier law.

In 1736 the Statute 9 Geo. II, c. 5 repealed the Act of 1604 as well as the Scottish Act of 9 Mariae "Anentis Witchcraft"—Witchcraft was thenceforward not a Felony but pretenders thereto were liable to be put in the Pillory and to be imprisoned for a year.

Accordingly, it was not till 1736 that the Statute of George II, c. 5, abolished the crime of Witchcraft, and Blackstone more than half a century later, while he does not class the Statute of 1603 "under the head of improvements," rather shamefacedly expresses his agreement with Addison "that in general there has been such a thing as Witchcraft though one cannot give credit to any particular modern instance of it." *Spectator*, No. 117: Blackstone, *Commentaries*, Bk. IV, pp. 61, 436.

³An earlier account of these trials was given in a pamphlet "Printed for William Shrewsbury at the Bible in Duck-lane 1682"—this is reprinted with learned notes in 6 *Cobbett's State Trials*, 1810, at pp. 647, *sqq.*

See also Davenport Adams: *Witch, Warlock and Magician*, New York, 1889 (a very unequal book) at pp. 281, *sqq.*

Other Witchcraft cases in the *State Trials* are to be found in Vol. 2, p. 49; vol. 4, p. 817: Vol. 8, 1017—and a curious case of Richard Hathaway of Southwark, a blacksmith's apprentice being convicted in 1702, of pretending to be bewitched by Mrs. Sarah Morduck "an honest and pious woman and not a Witch," in Vol. 8, p. 639. He had accused her of Witchcraft. She was tried at Guildford and acquitted after "the rabble got about her in London and abused her." The jury found him Guilty without leaving the Bar. He with others had a conviction against them for Riot and attacking Mrs. Morduck: 8 St. Tr. 690.

of the trial before Sir Matthew Hale in 1664 at Bury St. Edmonds, Suffolk, of Amy Duny and Rose Cullender, who were both convicted, March 10, and both were hanged, March 17, 1664, wholly unrepentant and denying the crime.

It may be worth while to see what was, two and a half centuries ago, considered by so great a man and philosopher as Sir Thomas Browne and so great a man and lawyer as Sir Matthew Hale to justify a verdict of Witchcraft and a sentence of death.

These unfortunate women were indicted severally for bewitching Elizabeth, Anne and William Durent, Jane Bocking, Susan Chandler, Elizabeth and Deborah Pacey (or Pacy).

The Durents were the children of Dorothy Durent, who swore that about March 10, 9 Car. II,⁴ she left her suckling infant, William, with Amy Duny with strict injunctions not to give it suck; Amy was an old woman with the reputation of being a witch, and the mother thought it must hurt the child sucking "nothing but wind." Amy disobeyed the injunction and on her return the mother was very angry. Amy in a great rage said: "She had better done something else than have found fault with her," and went away. This was the whole *fons et origo mali*—that very night, the child was taken with strange and terrible fits "of swoounding," and so continued for several weeks.

A mother nowadays would probably give the baby castor oil or its equivalent which "children cry for," but Dorothy Durent went to Dr. Jacobs of Yarmouth, "a man famous for curing persons bewitched"; and that wise man advised her to hang the child's blanket all day in the chimney corner and at night wrap the child in it, and if she saw anything in it not to be afraid, but to throw it in the fire. She did as directed, a great toad fell out of the blanket and ran about the floor (toads seem to have run in those days). A young man (not named or produced as a witness) "catch'd this Toad and held it in the Fire with a Pair of Tongs: immediately it made a great Noise, to which succeeded a Flash like Gunpowder, followed by a Report as great as that of a Pistol; and after this, the Toad was no more seen. Neither was its substance perceiv'd to consume in the Fire." This was not all, the next day came in a niece of Amy Duny (not named or produced) and said that her aunt was in a sad way, her face being scorched. Dorothy went to see and found Amy with "her Face, Legs and Thighs much scorch'd with Fire."⁵ She asked Amy how this happened and

⁴1657—the reign of Charles II *de facto* began on the Restoration in 1660: but in law, the Commonwealth was passed over and it was supposed to begin on the execution of his father January, 1649.

⁵For the reason given in the next preceding note, this date March 6th, 11 Car. 11, would be March 6th, 1659.

she answered: She might thank her for it, she was the Cause of it, but she should see some of her children dead and go on crutches herself.

This extraordinary story was without a word of corroboration: it would be laughed out of Court in any civilized country now, but then it obtained credence from men of the deservedly high standing of Hale and Browne.

More was to follow. About March 6, 11 Car. II,⁵ Dorothy's daughter, Elizabeth, was taken with similar fits and cried out "that Amy Duny appeared to her and tormented her." The mother went for some physic for her and on her return found Amy Duny at her house alleging that she had come to see the child and to give her some water. Dorothy got very angry and turned her out, whereupon Amy said, "You need not be so angry, your child will not live long"—this proved to be true, for she died two days later. "And this examinant really believes that Amy Duny did bewitch her child to Death, she having long had the Reputation of a Witch and some of her Relations having suffered for Witchcraft."

Dorothy, soon after her daughter's death,⁶ fulfilled the rest of the prophecy—or malediction—she was taken lame in both legs some three

⁵It must have been about two years after her daughter's death that Dorothy became a cripple.

⁷This, of course, was the regular thing with witches everywhere. In the Baldoon Mystery, the only real Witch story this Province has afforded, John McDonald being much troubled with supernatural noises, missiles, &c., &c., apparently the work of a Witch, went to a doctor's daughter, "gifted with second sight and the mystical power of stone reading." She told him something of the future—the story is finished in my *Old Province Tales*, Toronto, 1920, at pp. 266-268, thus:

"But of much greater importance was the information she gave of the author of all the mischief—a stray goose which McDonald had once seen in his flock and had attempted in vain to shoot. The girl said, 'No bullet of lead would ever harm a feather of that bird . . . in that bird is the destroyer of your peace . . .'. And she added, 'Mould a bullet of solid silver and fire at the bird: if you wound it, your enemy will be wounded in some corresponding part of the body.'"

"Joyfully McDonald made his way home, moulded his silver bullet, and made inquiry about the goose. This he found to be well known to his children: it had a dark head, almost black, had two long dark feathers in each wing, and was noticeable for making a perpetual noise and for its continual restlessness. Soon the bird was discovered, the gun aimed and fired, and the bird, with a cry like that of a human being in agony, struggled away through the reeds with a broken wing. The doctor's daughter had spoken of a long log-house: McDonald was not in doubt of her meaning—there was a long log-house near to his farm, inhabited by an old woman and her family who had tried without success to buy McDonald's land from him. Thence through the long reeds he made his way; and there he found an old woman with a broken arm resting on her chair. When she saw him she shrank back, and John McDonald knew that the silver bullet had found its billet. The manifestations ceased and peace thereafter reigned supreme: but the old woman suffered intense pain from her injuries till death came to her relief."

years before the trial and had to go on crutches. However, as soon as Amy was convicted, "she was immediately restor'd to her strength and went Home without Crutches."

The bewitching of Anne Durent was not by Amy, but by the other prisoner—and there is no word of evidence against her in respect of the Durents than has been given. It is so plainly autosuggestive, hysterical and *ex post facto*, if not perjured, that no one in these days would give it the slightest weight.

But Amy's villainies were not confined to the Durent children and their mother; she was "proved" to have bewitched Elizabeth and Deborah Pacey, 11 and 9 years old, respectively, daughters of "Samuel Pacey of Leystoff, merchant, a sober and good man."

His evidence was that Deborah was taken so lame in October, 1663, "that she could not stand on her Legs": at her own request, she was taken, October 17, to a bank on the east side of the house overlooking the Sea: while she was sitting there, Amy Duny came to the house to buy herrings but was refused and "went away discontented and grumbling." At this very "Instant of time, the child was taken with terrible Fits, complaining of a Pain in her Stomach as if she was prick'd with Pins, shrieking out with the Voice of a Whelp and thus continued 'till the 30th of the Month." Dr. Feaver being sent for could not account for all this: and the child between fits said that Amy Duny appeared to her and frightened her—and she charged the old woman with being "the cause of her Disorder."

Samuel Pacey, the sober, good man, "did suspect the said Amy Duny to be a Witch and charg'd her with being the Cause of his child's Illness and set her in the stocks."

In the stocks, she was asked what was the reason of the child's illness, and she said: "Mr. Pacey keeps a great stir with his child, but let him stay till he has done as much by his children as I have done by mine"—and explained that she had been fain to open her child's mouth with a tap to give it victuals.

Two days afterwards, the elder Pacey child was taken with such strange Fits that they could not force her mouth open without a tap—and then the younger child was taken in the same way. Both children complained that Amy Duny and Rose Cullender appeared to them and tormented them: they kept crying out: "There stands Amy Duny," "There stands Rose Cullender." "The Fits were not alike. Sometimes they were lame on the *Right Side*, sometimes on the *Left*: sometimes so sore that they could not bear to be touch'd; sometimes perfectly well in other Respects but they could not hear; at other times they could not

see; sometimes they lost their speech for one, two and once eight days together. At times they had swooning Fits and when they could speak, were taken with a Fit of Coughing and vomited Flegm and crooked Pins and once a great Twopenny Nail with above 40 Pins which Nail the Examinant said he saw vomited up and many of the Pins. The Nail and Pins were produced in the Court. They usually vomited a Pin towards the end of a Fit, four or five of which they sometimes had in a Day."

They would say that the two accused often "appear'd to 'em . . . and threaten'd 'em that if they told what they saw or heard, they would torment 'em ten times more than ever they did before." Their aunt at Yarmouth, Margaret Arnold, to whom they had been sent, thought they "had play'd Tricks and put the Pins into their mouths themselves"; and so she took all the pins from their clothes, sewing them instead; but, notwithstanding "they rais'd at times at least 30 Pins in her Presence and had terrible Fits, in which Fits they would cry out upon Amy Duny and Rose Cullender saying they saw them and heard them threatening as before." The elder child told her aunt that "she saw Flies bring her crooked Pins and then she would fall into a Fit and vomit such Pins"—once she said she had caught a mouse and when she threw it into the fire, her aunt said "something like a Flash of Gunpowder altho . . . she saw nothing in the child's hand." And sometimes "one of them catch'd one of the Things like Mice running about the House and threw it into the Fire which made a Noise like a Rat."

Nothing, however, was so fatal to the accused as the evident possession by the Devil of the two Pacey girls—when caused by their father to read the New Testament, they could not pronounce the words Lord, Jesus or Christ but fell into a Fit; but when they came to the word Satan or Devil they would say "This bites, but makes me speak right well." This we would now call autosuggestion.

Diana Bocking of Leystoff, mother of Jane Bocking, testified to her daughter having Fits, vomiting pins and a lath-nail, produced in Court and accusing the alleged witches.

Not dissimilar evidence was given concerning Susan Chandler by her mother and father. Poor Rose Cullender, moreover, was made to furnish evidence against herself. Mary Chandler, Susan's mother, being appointed with five other women by Sir Edmond Bacon, the Magistrate who issued the Warrant on the complaint of Mr. Pacey, "to search the Bodies of the Prisoners," they found in the abdominal region of Rose, "something like a teat about an inch long," and then

a smaller one. Of course these were simple hernias and were so explained by Rose—but in vain, they were clearly the identifying marks of a favorite of Satan.⁸

Three of the supposed bewitched were in Court, Anne Durent, Elizabeth Pacey and Susan Chandler, but none of them gave evidence—they all “fell into violent Fits screaming in a dismal manner, so that they were incapable of giving their Evidence; and altho’ they did at length recover out of their Fits yet they continu’d speechless ’till the Conviction of the Prisoners.”

William Durent would be about 7 or 8 years old only; Elizabeth Durent was dead; Jane Bocking “was so ill that she could not come to the Assizes”; as was Deborah Pacey.

Serjeant Keeling⁹ “was unsatisfy’d with the Evidence which he thought not sufficient to convict the Prisoners.” Common sense surely spoke when he said: “Supposing these persons were bewitch’d yet their Imagination only was not sufficient to fix it on the Prisoners.” No modern lawyer could find a tittle of evidence against either prisoner of being guilty of the offense with which she was charged.

But “the learned Dr. Browne of Norwich being also present,” placed an indelible stain on his name by giving “his Opinion of the three Persons in Court. He said he was clearly of Opinion that they were bewitch’d; that there had lately been a Discovery of Witches in *Denmark* who us’d the same Way of tormenting Persons, by conveying crooked Pins, Needles and Nails into their Bodies. That he thought in such Cases the Devil acted upon Human Bodies by natural means, viz., by exciting and stirring up the superabundant Humours, he did afflict them in a more surprizing manner by the same Diseases that Bodies were usually subject to. That these Fits might be natural only rais’d to a great Degree by the Subtilty of the Devil co-operating with the malice of these Witches.” He does not seem to have suspected that the co-operator was the malice or mischievousness or love of notoriety of the children.

The conduct of these children in Court should have opened the eyes of everyone—for example, one of them in a fit would shriek out, etc., when touched by one of the accused; but when blindfolded and touched by an innocent bystander, she made the same exhibition.

Then some utterly irrelevant and incredible evidence was given as to other acts of witchcraft by the two old women—Sir Matthew charged the Jury saying “he did not in the least doubt but these were

⁸It was supposed that the Devil used to suck these adventitious projections!

⁹Or Keyling.

witches: *First*, Because the Scriptures affirm it; *Secondly*, Because the Wisdom of all Nations, particularly our own, has provided Laws against witchcraft; which implies their Belief of such a Crime. He desir'd them strictly to observe the Evidence and begg'd of God to direct their Hearts in the Weighty Concern they had in Hand since to condemn the Innocent and let the Guilty go free are both an abomination to the Lord."

The Jury after half an hour's absence brought in a verdict of Guilty on all Counts, thirteen in number.

Within half an hour afterwards all the afflicted were "restor'd to their Speech and Health and slept well that Night without Pain except Susan Chandler, who complain'd of a Pain like pricking of Pins in her Stomach." Annie Durent seems to have had some qualms of conscience: for she prayed that she might not see the witches; "but the other two declar'd in open Court before the Prisoners (who did not contradict them) that all that had been sworn to was true. After this, the whole Court being satisfy'd with the Verdict, the Witches were sentenced to be hang'd"—and hanged they were and the judicial murder was complete. Convicted on Thursday, March 13, 1665, they were executed on Monday, March 17, Sir Matthew Hale being so satisfied with the verdict, that he refused to grant a reprieve.

Recent Judgment Given in Case Under Act for the Prevention of Venereal Diseases

DELIVERED BY THE HONOURABLE MR. JUSTICE RIDDELL

THIS is an action of slander; the plaintiff filed a jury notice, but at the Sittings, both parties by their Counsel desired that it should be tried without a jury, and I accordingly dispensed with the jury under the provisions of O.J.A., sec. 53.

A. C., a young girl under age, suing by her father, B. C., as next friend, brings action against Dr. D. for slanders alleged to have been published by him of her to her father and her employer, E. No special damage is claimed and none proved: general damages for injury to character and reputation alone are sought.

The words alleged to have been published to the employer, E., are set out in the statement of claim as follows:

"A. C. has a communicable disease, she has acute gonorrhoea, and you should not allow her to sleep with your daughter, and you and your family should not eat from the same dishes she does or be brought into contact with her."

The plaintiff failed to prove these words. I think that sitting without a jury I should allow any amendment necessary to meet the facts as proved—the pleadings then may be amended accordingly to set out the words actually used.

The words alleged to have been published to the father, B. C., are sworn to in substance by him, and they are substantially proved.

I find the following facts:

One, F., a taxi-driver, who lived sometimes with one parent in K. and sometimes with the other at O., came to the office in O. of the defendant to be treated for acute gonorrhoea. Recognizing this to be a communicable disease of a very virulent type, the doctor conceived it to be his duty under sec. 55 (1) of the Public Health Act, R.S.O., 1914, ch. 218, to give notice to the Medical Officer of Health, and he did so. I had doubt as to the admissibility of this notice, and had caused it to be marked "A" for identification only, but both Counsel desired it to be put in as evidence, and I accordingly allowed it in—Exhibit 1.

A form for such notice has been prepared by the Provincial authorities. The matter is thought of such great importance to the health of the people that the Postmaster-General of Canada has directed that such

notices shall be free of postal charges. The form supplied to physicians requires to be stated the "source of infection" and also the "school where attended by children who are contacts."

Dr. D. asked the patient the source of infection and was told that it was the plaintiff; and the patient gave a circumstantial account of the time and place of the sexual congress. He also stated that she was in the employ of E. Dr. D. was the family physician of E., and he thought it his duty to make inquiry as to the contacts in E.'s family. He went to E., and asked him if the plaintiff were in his service. On receiving an affirmative answer he asked if she slept with anyone and was informed that she slept with E's little girl. Then the defendant said, "I am treating this boy for an infectious disease—govern yourself accordingly."

While "infectious disease" is a broad term covering scarlet fever, measles, small-pox, etc., I am of opinion that the words employed did sufficiently convey a charge of venereal disease against the plaintiff. While, no doubt, a girl could infect a boy with measles, etc., the circumstances of this case, including the suppression of the name of the disease, were sufficient to cause a person of ordinary intelligence to understand that what was meant was that the plaintiff was tainted with venereal disease and would not for that reason be allowed by a prudent father to sleep with his little daughter. The decision in *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, lays down that in the interpretation of words, "the manner and occasion of their publication, the persons to whom they were published, and all other facts which are properly in evidence as affecting the meaning of the words in the circumstances of the particular case, must be taken into consideration in determining whether the words are defamatory or not": Gatley, Libel & Slander, pp. 116, 117.

If we are to look into the mind of the defendant, there can be no doubt of his meaning; but words are not to be construed according to the secret intent of the speaker: *Hankinson v. Bilby* (1847), 16 M. & W. 422, 445. It was said more than three hundred years ago: "The slander and damage consist in the apprehension of the hearers": *Fleetwood v. Curley* (1619), Hob. 268.

And the old rule that, in actions of slander, words must be taken *in mitiori sensu* is no longer law; *French (Oscar) v. Smith* (1922), 53 O.L.R. 28, at p. 30. Even when the antique rule was in force, the mention of a woman in the same connection was enough to make it non-applicable. See case cited by Holt, C. J., in *Clifton v. Wells*, 12 Mod. 634; *Bloodworth v. Gray* (1844), 7 M. & G. 334. So here the mention of

a boy as afflicted with an infectious disease in connection with what is said of the girl is enough to satisfy even the old rule.

Of the conversation with the father, there can be no question in respect of the imputation—he told the father that the plaintiff had venereal disease and that she should be attended to—I do not believe that he added a menace that, unless that were done in twenty-four hours, he would make it cost the father \$100.

Charges of having a venereal disease are, of course, actionable without allegation or proof of special damage: *French (Oscar) v. Smith*, 53 O.L.R. 28, and authorities cited.

There is here no defence set up of justification; and the plaintiff was not required to prove the falsity of the charges. She undertook to do so; and, in view of the character of the charge, I thought it proper to permit the evidence.

Not only did she herself deny ever having had venereal disease—which would not perhaps go very far, even assuming her honesty—but her father, on hearing from the defendant of her alleged condition, took her to his family physician, Dr. S., who examined her, and he swears that he found her free from venereal disease.

The defence set up is privilege, *i.e.*, qualified privilege.

The defendant says that he went to E. as his family physician; that he was such is true; that he believed he was the family physician to the father of the plaintiff is equally true, and he had good grounds for so believing—the father had just been paying him the balance of his account, apparently without any complaint.

I hold that as to the statements to E., there was a clear moral duty in the defendant, E.'s family physician, to notify E. of the danger his family seemed to be in.

The ravages of communicable disease were so damaging to the commonwealth that many years ago it was in Ontario made compulsory for physicians to notify the Medical Officer of Health or Health Officer of such diseases. Beginning in 1884 with 47 Vict., ch. 38, sec. 49, requiring the physician to report small-pox, scarlet fever, diphtheria, typhoid fever or cholera, through R.S.O. 1887, ch. 205, sec. 80, and R.S.O. 1897, ch. 248, sec. 89, we reach (1912) 2 Geo. V., ch. 58, sec. 55 (1), in which the requirement is extended to every "communicable disease"—as at present, R.S.O. 1914, ch. 218, sec. 218.

The appalling prevalence of venereal diseases and their terrible effects were most forcibly brought to the attention of the civilized world by the late war, indicating that a considerable number—not less than 10 per cent.—in every civilized country were infected with such diseases, a veritable cancer eating into the very heart of the people. One of the

results in Ontario was the passing of "The Venereal Diseases Prevention Act" (1918), 8 Geo. V., ch. 42 (Ont.), and the amending Acts (1920) 10 & 11 Geo. V., ch. 82, and (1922) 12 & 13 Geo. V., ch. 89.

None of these Acts specifically makes it the legal duty of a physician to report communicable disease except in cases which he is called upon to visit, and that report is to be made to the Health officer; in the case of venereal diseases (specially) the legislation has not yet gone beyond the case of those under arrest, under charge, or committed to some place of detention. But sec. 4 of the Venereal Diseases Prevention Act prescribing action by the Medical Officer of Health when he "is credibly informed that a person resident in the . . . district is infected with venereal disease and has infected . . . other persons," it seems plain that it is at least a moral duty on the part of every good citizen to furnish such credible information if and when he can. The statute by the same section requiring such apparently infected person, on notice, to procure a clean bill of health *quoad* such diseases, indicates the view the legislature takes of the seriousness of the danger to the public of venereal infection.

I am of opinion that any medical man—while there is no legal obligation cast upon him to do so—owes a moral duty to those for whom he is family physician to warn them of danger of venereal infection concerning which he has credible information. If he failed to do so, the family would have a good right to complain and to decline to continue to employ him. It is, too, a matter that can not wait.

For example, suppose in the present case that the plaintiff was in fact infected, and, there being no warning given, the little girl of E. had become infected, what would E. have said? What excuse would the doctor have had? Of course, the danger to the child sleeping with an infected woman is notorious—"common knowledge."

Much the same considerations apply to the communications to the father. The doctor honestly thought the daughter was diseased, he honestly thought that he was the family physician—what else could he do but inform the father? I think it was his moral duty to do so; and the fact that the girl had been his Sunday School scholar rather increased than diminished the duty.

The tendency of the English cases has been rather "to extend the limits of the moral duty or reasonable exigency which authorizes the publication of defamatory matter"; *Cowles v. Potts* (1865), 34 L.J.Q.B. 247, *per* Blackburn, J., at p. 250. I agree with the statement in *Gatley on Libel & Slander*, at p. 231, "the law . . . would be followed at the present day . . . that where a person who has information which materially affects the interests of another tells that other what he knows

with the honest purpose of protecting his interests, and in the full belief that his information is true, such communication, though volunteered and made to a complete stranger, is privileged": *Davis v. Reeves* (1855), 5 Ir. C.L. R. 75, at p. 90; *Amann v. Damm* (1860), 3 C.B.N.S. 597, at p. 602; *Davies v. Snead* (1870), L.R. 5 Q.B. 608, at p. 611; *Stuart v. Bell* (1891), 2 Q.B. 341 at p. 347; *Toogood v. Spyring* (1834), 1 C.M. & R. 181, at p. 193.

The tendency in the American courts, or some of them, indeed seems the other way; but I am not bound to follow them and do not follow them.

I think then these were occasions of qualified privilege.

Such privilege is, of course, lost if there were malice proved: "Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion": *Smith v. Streatfeild* (1913), 3 K.B. 764, at p. 770, *per* Bankes, J.

If the occasion be one of qualified privilege, the plaintiff must, in order to succeed, prove that the defendant was not using the occasion honestly for the purpose for which the law gave it to him, but was actuated by some indirect or ulterior motive, *e.g.*, malice in the popular acceptance of the term: *Gatley*, *op. cit.*, pp. 280, 281; *Clark v. Molyneux* (1877), 3 Q.B.D. 237. It is not necessary that the malice should be against the plaintiff—if the publication be made to gratify the defendant's malice against a third person, *e.g.*, the father of the plaintiff, the defence of privilege fails: *Stewart v. McKinley et. al.* (1885), 11 Vict. L.R. 802.

The mere fact that the words were untrue is no evidence of malice, no disproof of *bona fides*: *Caulfield v. Whitworth* (1868), 18 L.T.N.S. 527.

What are relied upon in the present case to prove malice are: (1) Want of examination of the plaintiff by the defendant to establish that she was infected with gonorrhoea; (2) conduct indicating ill-will against the father.

As to the latter I do not believe the father's evidence and do believe that of the defendant—there were no expressions of ill-will and no ill-will by the defendant against B.C. There is and can be no pretence of ill-will against the plaintiff—she had been the defendant's Sunday School scholar, and he had a regard for her—certainly no ill-will.

Even if the defendant had been negligent in not making an examination of the plaintiff, that would not be malice. "Mere carelessness is not of itself malice": *Thompson v. Dashwood* (1883), 11 Q.B.D. 43, at p. 46; *Cooke v. Brogden* (1885), 1 Times L.R. 497, at p. 498; *Pittard v.*

Oliver (1890), 63 L.T. 247, at p. 248. Not even gross negligence: *Lawrence v. Death* (1908) 28 N.Z.L.R. 620.

I find here no reckless indifference on the part of the doctor as to the truth or falsity, such as would evidence malice: *Clark v. Molyneux*, (1877), 3 Q.B.D. 237; *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, (1892), 1 Q.B. 431 (C.A.).

Finding, as I do, that the defendant had an honest belief in his statements, I cannot infer malice, even if he might have been more careful.

But I fail to see how the defendant could have been reasonably expected to make more certain of the truth of his information—it has not been proved that he could have done so by any such examination as is suggested. And, if I am to be permitted to use the information afforded by medical works of authority, it is clear that the girl might be a focus of infection without any tangible or visible signs of such a condition and without knowing her condition. Had the presence of the infection in the young woman been in question, I should have required much stronger and more detailed evidence of her freedom from the disease than was given, to convince me. See, e.g., George Luys' "A Text-Book on Gonorrhoea", Toronto ed., 1913, pp. 22-24.

I do not, however, place any reliance upon this phase. What is in my mind is that the fact that the doctor did not insist on making an examination of the girl does not establish malice—amongst other reasons, he had been taught that he had no right to do so without the father's consent.

I think that the defendant in acting as he did, acted as a good citizen, a conscientious physician, under a real sense of duty and without malice.

His refusal to sign the proposed apology is no evidence of malice—he thought, as I think, that he had acted as his moral duty called upon him to act; and no honest man should or could ever apologize for doing his duty.

The action must be dismissed with costs. No complaint is made of the report of the Health Officer, Exhibit 1—this is clearly privileged.

In the above I have dealt with the express and special Statutory provision of the law alone: but it must be borne in mind that there are other provisions equally binding on physicians. By the "Public Health Act" (sec. 8) and of the "Venereal Diseases Prevention Act" (sec. 13) power is given to the Provincial Board, subject to the approval of the Lieutenant-Governor in Council, to make Regulations for the control of communicable (including venereal) diseases. Under the authority of the "Public Health Act", the Provincial Board has made Regulations which require that venereal diseases shall, amongst others, be notifiable;

and under the authority of the "Venereal Diseases Prevention Act", a similar requirement is defined. These Regulations are as follows:—

"*Public Health Act*, Regulation 1.

Diseases requiring notification, Sections 49, 50, 53, 55, 56, 61, shall apply to the following communicable diseases which must be reported to the Medical Officer of Health or secretary of the local board of health.

No. 5.....Chancroid

No. 12.....Gonorrhoea

No. 32.....Syphilis."

"*Venereal Diseases Prevention Act*, Regulation (g).

Reporting:

Every medical practitioner, every hospital superintendent, the head of every hospital for the insane, for epileptics, for the feeble-minded, the head of every jail, reformatory or other place of detention and every institution, private, public or otherwise, shall report daily to the medical officer of health by a serial number, in accordance with Form VI, every case of venereal disease coming under his treatment or care for the first time. If the patient has been under treatment by another physician or institution, notice thereof shall be sent forthwith to the medical officer of health, but without giving the name of the patient.

The aggregate of all cases of each form of venereal disease shall be reported weekly by the Medical Officer of Health directly to the board."

It is quite clear that a physician is required by the law of Ontario to report venereal diseases as well as all other communicable diseases.

APPEAL OF DEATH AND ITS ABOLITION

BY WILLIAM RENWICK RIDDELL*

THE Appeal of Death—or, as it is sometimes called, the Appeal of Murder, because it was generally invoked in cases of murder although cases of manslaughter were also within its scope—was an interesting survival of ancient law which continued its existence in England until a little more than a century ago, and which, when it fell, brought down a mass of crumbling and antiquated rubbish, which served no good purpose and might—sometimes did—do harm.

In essence, under the old law and conception of rights, it did not differ from Appeal of Felony—they were both for vengeance at the instance of one who was wronged against the wrongdoer. As the *MIRROR OF JUSTICES* puts it, ii, c. 3, "If anyone shall seek vengeance, then shall he begin his action by an Appeal."

In primitive conditions of society, what we call crimes are not the concern of society but of the person injured. Blackstone quoting from Lady Mary Wortley Montague¹ tells us that in Turkey that principle was carried so far that even murder was not prosecuted by the government, that that was the business of the nearest relations and if they chose to accept a money compensation, nothing more was done about it.

Even when it came to be seen that an act such as murder concerned the whole community—became a "crime"—the rights of the relations were not abrogated. Indeed these rights were considered paramount for centuries in English law, so that in case of death occasioned by another he could not be prosecuted at the suit of the King for a year and a day after the death. This was to enable the relatives

*Justice of the Supreme Court of Ontario, Appellate Division.

¹Blackstone: *COMMENTARIES ON THE LAWS OF ENGLAND*, iv, 313 note (u): quoting Lady Mary Wortley (whom the contemporary wit somewhat maliciously called Mary Worthless) Montagu, *LETTERS*, 42. A very interesting volume: *LADY MARY WORTLEY MONTAGUE, HER LIFE AND LETTERS*, edited by Lewis Melville, has recently been published by the Houghton Mifflin Co., N. Y. and Boston.

to take proceedings to bring the offender before the court and fight to the death unless compensation satisfactory to the complainant were made. Afterwards by the Statute of Gloucester this proceeding must be taken within a year and a day of felony completed.² Such a proceeding was called an Appeal—and a similar proceeding was open to anyone the victim of certain felonies, larceny (including robbery), rape and arson.³ With the Appeal of Felony, however, this paper has no concern except incidentally.

This delay in prosecution by indictment was abolished in 1486 by the Act, 3 Henry VII, c. 1, to be considered more at length hereafter, but this statute did not abolish the Appeal of Death.

The right of Appeal of Death was not vested in all the world. As regards women, whatever may have been the law before 1215,⁴ Magna

²Statute of Gloucester (1278) 6 Edward I. I cannot be sure whether this, as so many Statutes, was "in affirmance of the Common Law"—for the purposes of this paper the question is unimportant.

³THE MIRROR OF JUSTICES, Lib. II (cc. 17, 18 and 20) gives also an Appeal of hamsoken (housebreaking), imprisonment and wounding as well as (cc. 16, 19 and 21) of robbery and larceny, mayhem and rape. The two volumes of the CURIA REGIS ROLLS OF THE REIGNS OF RICHARD I AND JOHN published by the King's Printer, London, 1922 and 1925, contain a number of Appeals involving hamsoken, imprisonment and wounding but as one or more of the three clearly appealable felonies was or were also involved, I cannot be sure that the author of THE MIRROR is to be relied upon in this any more than in some parts in which, to use the language of Sir Frederic William Maitland: "The right to lie he exercises unblushingly." Selden Society: THE MIRROR OF JUSTICES, London, 1895, Maitland's Introduction, p. XXVI. Cf. my article, "King Alfred's Way with Judges." 16 ILL. L. REV. 147. THE MIRROR also gives, cc. 13, 12, 11, Appeal of Treason (which will be spoken of in the text) of Falsification and of Laesa Majestas—By Book, cc. 4, 5 Laesa maiestatis is called a "mortal sin" which may be against the King of Heaven in any of three ways, by heresy, apostasy and sodomy; against the earthly King in three ways, by compassing death, compassing dethronement, defiling wife, &c. Heresy included "Sorcery and divination which is a kind of Heresy"—see the case of Gillian in Hilary Term, 10 Richard I, in the text *post*, and note 29 *post*. In ii, c. 11 THE MIRROR says there is no appeal for Laesa maiestas but there are actions or indictments; but the reason given does not cover sorcery, which may by implication be excluded from the statement. A form of indictment for sorcery is given ii, c. 22. See note 29, *post*. The crime of sorcery will be spoken of in the text, *infra*.

⁴THE MIRROR says, Lib. II, c. 7: "Al appeal de homicide soleient tuz parentz tuz affins e tuz alliez recevable". To the Appeal of Homicide all relatives, all connected by affinity or alliance are customarily entitled.

Carta by Chapter 35⁵ expressly provided that "No one shall be taken or imprisoned on the appeal of a woman for the death of any one but her own husband." All our sages of the law agree that if the deceased had a wife at the time of his death and she were wholly innocent of it, she and she only had the right to the Appeal.⁶

The recent publication by the King's Printer of the *CURIA REGIS ROLLS OF THE REIGNS OF RICHARD I AND JOHN*,⁷ enables us to follow the course of such an Appeal.

In Hilary Term, 10 Richard I, (1199) we find the following record,⁸ "Notingh' — Alicia que⁹ fuit uxor Roberti Coger¹⁰ appellat Willelmum filium Mauricii et Radulphum fratrem ejus quod in pace regis et nequiter conbussit domum Roberti viri sui et suam, et ipsum Robertum virum suum nequiter interfecit inter brachia sua et eam postea robavit: et hoc offert probare versus eos si consideraverit curia: et Willelmus venit et defendit totum de verbo in verbum si versus feminam et suniantam.¹¹ Consideratum est quod mandetur Hugoni Bard' et aliis justiciariis ibi itinerantibus quod

⁵Nullus capiatur nec imprisonetur propter appellum feminae de morte alterius quam viri sui. There does not appear in known extant records any particular abuse calling for this provision: no doubt it was due to the fact that one appealed of homicide by a woman could not wage Battel. See note 12 *post*. *THE MIRROR*, IV, c. 23, says that when the Appellor could not fight, the proof by ordeal belonged to the Appellor only.

⁶E.g., Blackstone: *COMMENTARIES*, IV, p. 314. Hawkins: *PLEAS OF THE CROWN*, ii, c. 23 (1824) ed., p. 235 and authorities cited. *MIRROR OF JUSTICES*, ii, c. 7, p. 50, says "mes lapel del espouse al occis est recevable devaunt tuz autres"—but the Appeal of the wife of the slain is receivable before all others.

⁷See note 3. These admirable volumes were printed under the superintendence of the Deputy Keeper of the Records, H. C. Maxwell-Lyte and the preface, text and index were prepared by C. T. Flower, an Assistant Keeper of the Records—they are a credit to editor, printer, proof-reader and binder. (They will be cited thus: "1 C. R.", the 1922 volume, and "2 C. R." that of 1925).

⁸1 C. R. p. 100—observe that hamsoken is in effect charged as well as murder—See note 3 *ante*. Robbery is also expressly charged.

⁹In most mediaeval MSS the diphthong "æ" was not used, the vowel "e" taking its place—"que" we should now see as "quae"—"Alicia" may be translated "Alice" or the Latin form "Alicia" may be retained.

¹⁰The use of family names was still rare. "Coger" may mean "the peddler."

¹¹"Amicam", "Lady Friend" is still the euphemism for a person in that capacity. Sunianta is from the Greek, a companion. It may mean "Guest" from the mediæval Latin "Soniare." See Du Cange, *sub voc.*

faciant inquisitionem per legales homines patrie utrum ipsi culpabiles sunt de morte illa an non et utrum ipsa Alicia fuerit desponsata ipsi Roberto an ejus sunianta, et inquisitionem illam faciant venire apud Westmonasterium quando illuc venire poterunt.”

I translate as literally as the respective idioms of Latin and English permit:

Nottingham—Alice who was the wife of Robert Coger appeals William son of Maurice and Ralph his brother for that in the King's peace and wickedly he burned the house of Robert her husband and of herself and the said Robert her husband he wickedly slew in her arms and her thereafter robbed: and this she offers to prove against them as the Court shall consider: and William comes and denies the whole, word by word as against a woman and a concubine. It is considered that it be commanded Hugh Bardolph and other Justiciars there itinerant that they make inquisition by lawful men of the country whether they are guilty of this death or not and whether the said Alice had been married to the said Robert or his concubine and that they return the said inquisition to Westminster when they are able to go there.

Bracton and Fleta as well as The Mirror lay down the rule that the wife can have an appeal only of the death of her husband slain *inter brachia sua*,¹² and we find here the Appellor alleging the death

¹²See Hawkins, *op. cit.*, p. 234. THE MIRROR, ii, c. 7, says it is not every spouse whose appeal is receivable “mes de cel soulement en qi braz qest ataut adire cum en qi seisine il esteit occis”—but of her only in whose arms (which is the same as to say, in whose seisin) he was slain.

The examples given in c. 15, set out the manner of death—by a sword piercing his body “whereby he was nearer to death than to life”, an axe, hatchet, stone or staff, folly or neglect by medical attendant, withdrawal of sustenance, hanging, delaying delivery from gaol, procurement of death. Two precedents are given which show that the actual death of the person injured was not necessary. “Or thus: tortured him into confessing and becoming an Approver so that he falsely confessed to have sinned when he had not sinned and caused him to appeal the innocent with crime, so that it was not for want of will on Carling's part (qe en Carling ne remist) that the said Knotting was not adjudged to death. Or thus: whereas the said Knotting was lying maimed in bed or was so lame or so young or so old or so sick that he could not walk, there came this Carling and fetched or carried the said Knotting from such a place on such a day, etc., to such a pool, ditch, well, marlpit or desert place and him there threw and him left without aid and sustenance so that it was not his fault that he did not die there of hunger and thirst.”

in these words. Whatever the original meaning of the words, Coke interprets them as meaning that the deceased had the wife lawfully in his possession at his death—originally, however, the expression was probably to be taken literally, at least to the extent that she saw the deed committed.¹³

The defence set up in this case is twofold: a plea in abatement

This was admittedly taking the will for the deed: and in Book IV, "Of Judgment" in c. 16 "Of the Judgment of Homicide" the second case is "that of those who have the will to kill but do not kill, e.g., those who abandon infants, old and sick folk in places where they intend them to die for want of help and those who torture an innocent man and make him confess felony and mortal sin, and these are to be adjudged to death for their corrupt intentions albeit they did kill according to their purpose. Such is the case also of those who are homicides in will who appeal or indict an innocent man of a mortal crime and do not prove their appeals or their assertions: and such were formerly adjudged to death but King Henry I ordained "that they should be adjudged not to death but to corporal punishment * * *" See the case of John of Wasinghele in Hilary Term, 2 John in the text, *post*. In the definition of homicide in Book 1, c. 9, are found "homicides in will," homicides de volonte, as false jurors, false witnesses, false appellors, &c., &c. "so that it is not their fault if death does not follow." The remaining precedent is extremely interesting and may furnish a clue to Chapter 36 of Magna Carta—see note 5, *ante*.

"Ou faussement juega Raghenild, qe primerment atteint les xij faus jurors temoins qi pendirent Godrun soun mari atort par xxiv jurors qe pus par divers appeals pendi le primers xij jurors"—Or falsely judged Raghenild who in the first instance had attained by twenty-four jurors the twelve false jurors—witnesses who had wrongfully hanged her husband Godrun, and then by divers appeals hanged the former twelve jurors.

What had happened was that Godrun the husband of the appellant had been convicted by a jury of the vicinage—still 'temoins'—and hanged. Thereupon Raghenild took such proceedings as that that jury were attained for false verdict. In later days this could only be at the suit of the King. Blackstone's COMMENTARIES, iv, p. 361; 2 Hale: PLEAS OF THE CROWN, p. 310—but apparently at that time it was not so restricted: MIRROR, ii, c. 33. This attain was tried by twenty-four jurors who found against the former twelve, and they were hanged either on the attain or (apparently) on Appeals by Raghenild. Then someone falsely judged Raghenild of something, perhaps of perjury, and the widow of Godrun appealed him. This as well as the "divers appeals" taken by Raghenild indicates that an Appeal lay for false judgment but I do not find any reference to such an Appeal in our law writers.

It may have been such cases as those of Raghenild which led to the provisions of chapter 36 of Magna Carta: and it may have been the rights of the "femina" *quâ* widow and not those *quâ* woman that were intended to be curtailed.

¹³See in text, *post*.

that the Appellor was not the wife of the deceased and a principal plea of *non fecit*.

As to the former it is quite certain that *ne unques accouple in loial matrimonie* was always a good plea. The authorities say that this issue is to be tried by the bishop's certificate¹⁴ but in this case it is ordered to be tried by a jury of lawful men at the same time as the main issue: a jury were to decide whether Alice was wedded wife or "lady-friend."

Another case about the same time may cast doubt on the statement that the wife has the sole right to the Appeal to the exclusion of the heir.

In Easter Term, 2 John, (1201) we find this record¹⁵ "Thomas de Baskervill' appellat Rogerum filium Willelmi quod ipse in pace domini regis et nequiter et noctu interfecit patrem suum Thomam in domo sua; et hoc offert, etc. sicut ille qui hoc vidit dum fuit infra etatem unde, post ipse fuit etatem ipse eum incepit appellare; et Rogerus venit et defendit feloniam et mortem versus eum sicut versus dominum suum cui ipse fecit homagium: et Thomas venit et defendit quod non est homo ejus nec unquam ei homagium fecit postquam habuit etatem: set dicit quod dum fuit infra etatem, ipse fuit in custodia matris sue et nescit quod ipsa tunc eum fecit facere: et ipse Rogerus nichil dixit contra. Consideratum est quod duellum sit inter eos. Rogerus det vadium defendendi se. Vadiavit. Et Thomas similiter. Plegius Rogeri, Rogerus de Mortuo Mari. Dies datus est in crastino octavarum sancte Trinitatis; et tunc veniant armati."

Translated, this record reads:

Thomas de Baskerville appeals Roger son of William for that he in the King's peace and wickedly and by night slew his father Thomas in his house: and this he offers, etc., as he who saw this when he was under age, wherefore after he was of age he began to appeal him: and Roger comes and defends the felony and death against him as he did homage to him as his lord. Thomas comes and defends that he never did homage to him after he was of age but says that when he was under age, he was in custody of his mother and he knows not

¹⁴See Hawkins *loc. cit.* THE MIRROR, ii, c. 7, says: "the lay Court cannot try the question who was his wife *de jure*."

¹⁵1 C. R., p. 435.

what she then made him do—and the said Roger said nothing contra. It is considered that a duel be had between them. Let Roger give bail to defend himself. He gave bail—and Thomas the like. Pledge of Roger, Roger of the Dead Sea. A day is given on the Morrow of the Octaves of Holy Trinity: and then let them come armed.

It will be observed that no county is named, but there is another record of this proceeding¹⁶ which supplies this and other information. "Salop'—Dies datus Thome de Baschervill' appellanti et Rogero filio Willelmi de placito appelli, quod apud Westmonasterium est, in v septimanis post Pascha preteritum per dominum regem: et dominus G. filius Petri cepit in manum quod illud scire faciet predicto Thome."

Shropshire—A day was given to Thomas de Baskerville, appellant and Roger son of William in a plea of Appeal which is at Westminster, five weeks after Easter last past, by our Lord the King: and My Lord Geoffrey Fitz Peter¹⁷ took it in hand that he should cause this to be known to the said Thomas."

The only plea in abatement offered was that the Appellor was the "man" of the Appellee and could not call his lord to account^{17a} and that plea was successfully met.

The plea could not be made that the Appeal was barred by the lapse of time; the Statute of Gloucester was far in the future, but if the Appeal was the sole right of the wife, it is hard to see why this was not set up—unless, indeed, she was *particeps criminis*.

Of course, if the wife was not innocent of the death, the heir had a right to the Appeal; but nothing in the way of guilty knowledge is here made to appear; and one would have thought that had the defence been open to him, the Appellee would have pleaded that the deceased left a widow him surviving, and then leave the Appellor to reply his mother's guilt.

The Mirror, ii, 7 says: "E si ascun dedienz lage de xxj an appele li defendaunt ne lestovera ja de respoundre a si haute actioun einz ceo qil eit passe cel age, e pur ceo sunt tieux appealx suspendables

¹⁶I C. R., p. 417.

¹⁷Chief Justiciar of England.

^{17a}It may, indeed, be only an exception to trial by Battel as a duel could only be between "peer-equals" and not between "seignur e tenant ou familer," lord and tenant or servant, MIRROR, iv, c. 23.

jesques ataunt qu audeus (ambideus) les parties soient de plener age” —and if anyone under the age of twenty-one years appeals, the defendant need not answer in so high an action until he has passed that age: and therefore these appeals are suspended until both parties are of full age (at least if non-age is pleaded in Court).

As it was not until the Statute of 1486, 3 Henry VII, c. 1. that such an Appellor could make and appear by attorney, when the widow was Appellor, the issue was tried by a jury because a woman could not fight. She was required to appear in person; and at all times she was required to appear in court when the Appellee was called upon to plead, the statute giving the right to appear by attorney only after the Appeal “be commenced”. In case of conviction, even after this statute, she had in person to ask for execution. A horrifying story is told¹⁸ of a widow Appellor—being *enciente*, the judge had to go to Islington to determine her will; when she demanded the execution of the slayer, he was promptly hanged. The Crown had no power to commute or pardon one convicted of murder on an Appeal of Death: the Appellor might release with or without consideration, but neither King, judge nor anyone else had any thing to say about it.

If there was no widow or if she was *particeps criminis*, an Appeal according to all the authorities was open to the heir general unless he was *particeps criminis*, in which case the next heir had an Appeal.

Blackstone says on the authority of The Mirror of Justices that “heirship was confined by an Ordinance of Henry the First to the four nearest degrees of blood.” The Mirror, c. 2, s. 7, says “Mes lapees (lappel) de homicide fu restreint p le Rei Henri le premer jesques es quatre proscheines degres el sank”, but the Appeal of Homicide was restrained by King Henry the First within the four nearest degrees of blood. Any credit The Mirror ever had, has been destroyed in its latest edition by Sir Frederick William Maitland, who truly says that the author whoever he was “lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer,” was certainly a liar

¹⁸BROOKS ABRIDGEMENT, B. 2, Appeal pl. 112: VINER'S ABRIDGEMENT, tit. Appeal, Vol. iii, p. 581. See Kendall: TRIAL BY BATTLE, p. 70, note.

I do not understand why the Appellor was held to be bound to move for judgment in person in view of the express provisions of 3 Henry VII, c. 1: but there can be no doubt on the decisions.

who exercised the right to lie unblushingly.¹⁹ The very learned editor says: "We find no trace of any such legislation."²⁰

But was the right to an Appeal of Death limited to the heir at all?

The only two cases of Appeal of Death beyond what have already been mentioned, contained in the two volumes of the CURIA REGIS RECORDS published, do not seem to bear out the limitation.

The first of these is inconclusive and it does not seem worth while to copy the Latin Record—but I give a translation:

In Hilary Term, 2 John (1201), the following is recorded:²¹

Somerset. Simon, son of John, appeals Thomas, son of William for that he wickedly and in the King's peace with his force, that is to say, William Bascher, Humphrey de Goldwell, Elias son of Remilda, Robert son of Gervase, Robert Doggefel, William de Wideworth, William son of John and Robert son of Warin, entered into the house of his master at Babington where he sits at his breakfast, by means of two men of William, son of John, who through seduction caused them to enter on him and that the said Thomas with the aforesaid persons seized his master and dragged him by the feet and put him on a certain couch and brought fire and burned his face and beard and pulled out his tongue over his chin: and afterwards, his chests broken, they took his deed of grant (cartas) that is the grant of King Richard and the deed of the Archbishop and in contempt of our Lord the King they burnt the grant of King Richard and the Archbishop over his face: and afterwards they cut off his head with the hatchet of the said William Boscher: and he, himself, as he was serving his master at breakfast fled for fear and hid himself and saw this—and this he offers to prove by his body, &c.: and Thomas comes and defends the whole, word for word; and says that at another time the said Simon appealed the said Thomas in the Curia Regis at Westminster and he asks the record of this complaint as it was there made, because then he by judgment of the Court was dismissed without a day. It was agreed by license of our Lord the King in this way

¹⁹Introduction by Maitland in the Selden Society's edition, pp. xlvi, xlviii.

²⁰William Joseph Whittaker, p. 50, Note 2.

²¹1 C. R., p. 395.

that the said Thomas shall give him ten marks to be paid five marks at once and five marks at Easter by the hand of Hugo de Neville and besides endow for the soul of the father of the said Simon one chaplaincy—and the said Simon has cried quits to the said Thomas and all his people for the said death.

In this case, it may be that the slain man was in fact the father of the Appellor and it is for the peace of his soul that the chaplaincy (*j. monacum*, i.e., the support of one monk) is founded—and it is possible the “*dominus*” of Simon was really his father whom he was waiting on at breakfast when the marauders broke in on him by the treason of two men of his own son, William. Accordingly, while the death of John was made the subject of an Appeal it may have been *quâ* father and not *quâ* master (as the Complaint was laid before the Coroner in the first instance—he might have known the relationship).

The Mirror, i, 4, says that among those guilty of perjury against the King are “*ceux corouners qe plus defoiz qe une receivent appealx de proveurs*”—those Coroners who receive Appeals of approvers more than once. Apparently if an Appeal failed against one Appellee, the Appellor was not allowed to appeal any one else—and this is indicated also in i.13.

In i.13 it said that the Coroner can receive Appeals made within the year; so, too, in iii, 13, an Appeal not commenced within a year after the felony was done, could be excepted to.

Let us pass that over for the time being and consider the next case.

In Easter Term, 4 John, (1203) we read:²² “*Sudh’—Adam Malherbe appellat Willelmum de Witham aurifabrum de Walengeford quod nequiter et de nocte venit ad domum Philippi Croc domini sui in villa de Eston’ et firmavit ostia domus sue de foris cum aliis malefactoribus, ita quod nec ipse nec alii servientes domus exire non potuerunt: et postea venit cum illis malefactoribus et fregit ostia thalami et intravit et dominum suum interfecit nequiter et robavit pecuniam domini sui: dicit eciam quod ipse vidit eundem Willelmum per medium unius fenestre⁹ cum aliis malefactoribus ad illud malefactum faciendum: et hoc offert probare versus eum per corpus suum*

²² C. R., p. 195.

sicut curia consideraverit: Willelmus venit et defendit totum de verbo in verbum, sicut curia consideraverit, Consideratum est quod duellum vadietur. Plegii Ade⁹ de proseguendo Walterus de Andely Gillebertus Banastr'.

Dies datus est eis a crastino sancti marci Evangeliste⁹ in xv dies: et tune veniant ceteri appellatores.

Sudh'.—Milites de comitatu non male credunt Alfredum fratrem Alvredi qui se tenet in ecclesia et abjuravit terram, quod ipse non consenserit predicto malefacto. Ideo est sub plegio Gilleberti Banastr'.

Sudh'.—Willelmus de Holecumbe aurifaber positus in gaiolem male creditus est

Willemus filius Andre⁹ appellat Willelmus de Holecum aurifabrum de morte predicti Philippi ut de visu suo eo modo sicut Adam appellat Willelmum de Witham. Et consideratum est quod duellum vadietur. Plegii Willelmi de proseguendo Walterus de Andely Gillebertus Banastr'. Dies datus est eis in crastino octabatum sancte Trinitatis."

Southampton. Adam Mahlherbe appeals William de Witham, goldsmith of Wallingford for that he wickedly and by night came to the house of Philip Croc his lord, in the ville of Eston (i.e. Easton Crux in Hampshire), and fastened his doors from without along with other malefactors so that neither he (i.e. Adam) nor the other servants could get out: and afterwards he came with these malefactors and broke the doors of the chamber and entered and his master wickedly slew and stole (robavit) the money of his master: he says also that he saw the said William through a window with other malefactors doing this ill deed: and this he offers to prove against him by his body as the Court shall consider. William comes and defends the whole, word for word, as the Court shall consider. It is considered that a duel be waged. Pledges of Adam to prosecute, Walter de Andely, Gilbert Banastre. A day is given to them fifteen days from the Morrow of St. Mark the Evangelist—and then let the other Appellors come.

Southampton. The Knights of the County Court do not hold in discredit Aldred brother of Alured²³ who holds himself in the church

²³Alured was a collateral form of Alfred—students of Canadian history will remember General Alured Clarke, Lieutenant Governor at Quebec, whose

and has abjured the realm—in that he did not consent to the ill deed aforesaid. Consequently he is under the pledge of Gilbert Banastre.

Southampton. William de Holecumbe, goldsmith, placed in gaol is of ill fame.

William, son of Andrew, appeals William de Holecum, goldsmith, of the death of Philip aforesaid as from view in the same way as Adam appeals William de Witham. And it is considered that a duel be waged. Pledges of prosecution Walter de Andely Gilbert Banastre. A day is given to them, the Morrow of the Octaves of Holy Trinity.

The other entry adds nothing to the story:²⁴

“Sudh.—Adam Malherbe appellat Willelmum de Witham auri-fabrum, de Walingford’ quod nequiter et de noctu in pace domini regis venit ad domum domini sui Philippi Croc in villa de Eston’ et firmavit ostium domus sue de foris cum aliis malefactoribus ita quod nec ipse nec alii servientes.”

Southampton. Adam Malherbe appeals William de Witham, goldsmith, of Wallingford for that he wickedly and by night in the peace of our Lord the King, came to the house of his lord Philip Croc in the ville of Easton and fastened the door of the house from without with other malefactors in such a way that neither he nor the other servants—

There cannot be any doubt as to this story. Philip Croc was killed by a gang who had first locked his servants up—one of these servants, Adam Malherbe, said that he saw William de Witham, a Wallingford goldsmith through the window committing the act and appealed him of murder: the accused pleaded to issue and Battel was awarded.

Another servant, William Anderson, said that he saw William de Holecumbe, another goldsmith, committing the act: and he appealed

Proclamation brought into separate provincial existence the Provinces of Upper and Lower Canada.

According to THE MIRROR, i., c. 13, if one who had taken sanctuary was by habit a thief, robber, murderer, &c., and known and cried by the people as such, he could be dragged from sanctuary; but if of good report, he was safe. Here Aldred was not “male creditus” but “de bone fame.”

²⁴2 C. R., p. 241, an incomplete entry.

him of murder—and again Battel was awarded. As this Appellee was of ill-fame, ill accredited, *male creditus*, he was gaoled in the meantime. The law was that Appellor and Appellee alike were to be gaoled until the duel unless they found satisfactory bondsmen, “plegii”: the statement of The Mirror, ii, c. that “in the case of Appellors * * * no surety will suffice save the four walls of the gaol”, must be taken *sub modo*. The Mirror indeed thinks it an abuse that men appealed or indicted of mortal crime are allowed out of gaol on bail. Lib. v, c. 1, s. 61.

Apparently some one accused Aldred, brother of Alured, of having a hand in the murder: but he avoided all trouble by taking sanctuary and abjuring the realm. A “friend of the prosecution”, Gilbert Banastre, was allowed to bail him as he was not *male creditus*—but that is another story.

Here not only are two persons allowed Appeal for the one death, which might be explained by the fact that the Appellees were different and there were two prosecutions: but neither of them was the heir general, of the deceased or if one was, the other was not. If there had been any such restriction of the right to the heir general, it is impossible that the plea in abatement would not have been made.

I am satisfied that the right to Appeal of Death was not so restricted—at least in the 13th century—as has been stated. On principle so far as there could be principle in anything of the kind, it would be expected that anyone closely connected with the deceased would have the right to call his murderer to account.

We may derive some assistance here from other sources than our own law writers. It is recognized that after the Norman Conquest, the customs of Normandy so far as they agreed with the existing customary law of England were confirmed while considerable pains and ingenuity were exercised in importing the Norman law more fully. The Custom of Normandy did not differ materially from the well known Assise of Jerusalem, which gives a list of what persons might bring Appeals of Murder and to whom the Appellee was bound to answer. Amongst these were: “Tous ceaus ou celles qui sont tenus de foi au Meurtri ou à la Meurtrie, soit Home ou Feme ou Seignor ou Dame”—all those, male or female, who are bound in fealty to the

murdered person, whether man or woman, seignior or dame.²⁵ Husband and wife and all relatives had already been mentioned.

In the feudal state, the relation of lord and subordinate was very close and very important—we have already seen that a lord was not held to answer, or at least to fight, one who had knowingly and willingly paid him homage: and it was sufficient for Simon Johnson in Trinity Term, 2 John, to allege that the slain man was dominus suus without stating (even if that may have been the fact) that he was pater suus.^{25a}

From the circumstance that the Appellor always alleges that he saw the deed—in the case of a woman that the man was slain “inter brachia sua”—it seems clear that the law required that the Appellor should know and not simply suspect: and this is borne out by the fact that to the last the Appellor had to swear to the guilt of the Appellee.

The case in Trinity Term, 2 John, shows that the leave of the court was necessary before an Appeal could be settled—the concord there (as in all cases of fines) was “per licentiam domini regis”, and was of course paid for. This was in accordance with the theory and practice of the time by which the court supplied no inconsiderable part of the royal revenue.

An Appellor abandoning an Appeal ran some risk.

In Hilary Term, 2 John, (1201) we read:²⁶ “Cantebr’.—Johannes

²⁵See Kendall, *op. cit.*, pp. 150, 151—*post*, note 38. A somewhat amusing error is made in the interpretation of another clause of the Assise de Jerusalem by Kendall in the work mentioned in note 38, *post*—he says that the right to appeal for murder was given “to anyone who had been in his company *within a year and a day* before the murder and could thence call himself his companion.” The passage which is supposed to justify this statement is the last of three providing for the case of a foreigner: Tous ceaus & celles qui sont dou Pais dou Meurtri, se il est Pelerin estrange. Tous ceux & toutes celles qui vindrent au passage à qui il vent, se il est d’outre mer. Tout ceux & toutes celles qui ont esté avec le Meurtri ou la Meurtrie an & jour si com est devant dit.” All those male and female who are of the country of the murdered person if he is a foreign Pilgrim, All men and all women who came the same passage with him if he is from beyond the sea, All men and all women who have been with the murdered man or woman for a year and a day if as above said” (i.e. if from beyond the sea).

^{25a}THE MIRROR giving, ii, c. 7, the Appeal of Homicide *inter alia* to all connected by alliance, also, i, c. 7, says “Alliance is created by hire, homage or oath.”

²⁶1 C. R., p. 411. See note 12 *ante* as to punishment.

de Wasingel' venit in curiam et quietos clamavit Ricardum de Wasingel' et Widonem de Fukeswarthe et Rogerum q Malartes de morte patris sui, unde facerat eos attachiari et retraxit se. Et preceptum est quod habeat (*sic*) breve ad vicecomitem quod ipse et plegii ejus sint quieti et ut capiat corpus Johannis et mittat eum in gaoliam."

Canterbury—John de Wasingele came into Court and acquitted Richard de Wasingele and Guy de Fukeswrthe and Roger Malartes of the death of his father whereof he had had them attached and withdrew the charge. And it is ordered that he (i.e. Richard?) should have a writ to the Sheriff that he and his pledges be discharged and that he take the body of John and commit him to gaol.

John had omitted to obtain "licentia domini regis" and suffered for his neglect.²⁷ Even in a purely civil suit in those days, if a plaintiff failed, he was "in misericordiam", in mercy: and, unless excused from poverty, nonage or some other reason, had to pay a fine to the King, not unusually half a mark, 6s, 8d, equivalent to at least \$20 now.

The Statute of Westminster 2 (1285) 13 Edward I, c. 12, expressly provided that if an Appeal failed, the Appellor should be imprisoned one year and pay a fine to the King besides damages to the accused; and thereafter Appeals ceased to be in common use.

A word as to other criminal Appeals. Anciently we are told any subject could appeal another of high treason either in court or in Parliament: the former was considered to be *virtually* abolished by the Statutes, (1331), 5 Edward III c. 9, and (1350), 25 Edward c. 14 (not c. 24 as Blackstone has it, there are only 23 chapters in that Statute) although I find myself unable to read anything of the kind into either Statute. The Appeal in Parliament was expressly abolished by the Statute (1399) 1 Henry IV, c. 14.

For treasons beyond the seas there was an Appeal in the Court of the High Constable and Marshall: but for things done within the

²⁷I translate an imperfect record of Hilary Term, 2 John, (1201), 1 C. R., p. 386. "Cornwall: Richard de Lancelles who appealed Henry, son of William of breach of the King's peace came *coram rege* and by consent of our Lord the King abandoned the charge (*retraxit se*) and released (for himself and) his heirs for ever; and Henry will give him twenty marks which our Lord the King receives in mercy to the said Richard."

realm it is said that excluding treason and murder or manslaughter, there was an Appeal for only larceny, rape, arson and mayhem.²⁸

But this seems to be inaccurate—at all events we find the following record²⁹ in Hilary Term, 10 Richard I (1199). “Norf’.—Angnes³⁰ uxor Odonis Mercatoris appellavit Gilienam de sorceria: et ipsa liberata est per iudicium ferri,³¹ et ideo Angnes remanet in misericordia.”

Norfolk. Agnes wife of Odo Merchant appealed Gillian of sorcery: and she was cleared by judgment of (hot) iron: and accordingly Agnes will remain in mercy.

Outside of this, the cases in these volumes of Appeals for Felony come within the classes stated—at least, if mayhem includes assault producing abortion.

Of these we find two instances,³² one in Lincoln, Michaelmas Term, 2 John, (1200), and the other in Norfolk, Trinity Term, 5 John, (1203). In the former case the Appellee or rather the citizens of Lincoln successfully pleaded that Lincoln had the same right

²⁸See for example Blackstone: COMMENTARIES, iv, p. 315.

²⁹1 C. R., p. 108. A form of indictment or rather information for sorcery is given in THE MIRROR, ii, c. 22: “I say that Sebourgh, there, is defamed by good folk of the sin of Heresy for that she by evil art and forbidden miscreance and by charms and enchantments on such a day, etc. took from Brightwine, her neighbour, the flower of her ale (la fleur de sa servoise) whereby she lost the sale of it.”

³⁰It was very usual to insert an extra “n” before “gn”—e.g. Angnes, rengni, &c., &c.

³¹Blackstone: COMMENTARIES, i, v, p. 342, says that “fire-ordeal * * * (was) confined to persons of higher rank.” The real distinction, however, seems to have been that made in THE MIRROR, iii, c. 23: “the practice was to * * * place in the middle of his hand a piece of red hot iron in case he was a freeman (sil fust franc home) or if he were not free then to put his hand or foot in hot water * * *” THE MIRROR adds that “if he suffered no harm the adverse party remained as attaint”—here she was “in mercy” and no doubt was fined.

³²1 C. R., p. 293: 2 C. R., p. 295.

From an entry in Hilary Term, 4 John, (1203), 2 C. R., p. 151, it would appear that Matilda in this proceeding charged Margery Kelloc and Jordan Peper with this offence; they did not appear: an order was made to attach them: The bailiff did not return the names of the bondsmen, and a new order was made for appearance on the Quindene of Easter and for the attachment of the bailiff “for that he then show why he did not hold them to bail as he was directed.”

of being exempt from Appeal as London. The latter shows that the same defences were open in an Appeal of Felony as in a civil suit.

“Norf’—Matillis de Rames’ appellat Margeriam uxorem Radulfi Kellac quod in pace domini regis eam imprisonavit et in firmina tenuit et verberavit ita quod abortivit; et hoc offert probare versus eam etc.; et Margeria venit et defendit totum; et dicit quod alia vice coram justiciariis appellavit Radulfum Kelloc virum suum de eodem facto transactis x annis, quod non potuit negare. Unde Margeria recedit quieta: et Matillis in misericordia, Pauper est: Misericordia perdonatur.”

Norfolk. Matilda of Ramsey appeals Margery wife of Ralph Kelloc for that in the King’s peace she imprisoned her and kept her in close custody and beat her so that she aborted; and this she offers to prove against her, etc.: and Margery comes and defends the whole, and says that at another time before the Justices she appealed Ralph Kelloc her husband of the same act ten years ago, which she was not able to deny. Wherefore Margery is discharged, and Matilda in mercy. She is poor. Let the fine be remitted.

It is time to return to the Appeal of Death. The proceedings in the old cases show that the Appellor, if a man, was the challenger and offered the duel in the first place. By a course which I am unable to trace, the court before the abolition in 1819 had come to hold that the duel was a privilege for which the Appellee must ask or the trial must be by a jury—the trial was on the Appeal which did not go before a grand jury but like a coroner’s inquisition was laid directly before a petit jury.

The Statute of 1486, 3 Henry VII, c. 1, permitted an indictment for murder or manslaughter before the expiration of the year and a day period allowed by the common law: but care was taken not to interfere with the right of Appeal. If there were an acquittal, the prisoner was to be remitted until the expiration of a year and a day or admitted to bail—it became the practice to admit to bail unless the court was dissatisfied with the verdict.

In case of a conviction of manslaughter, if the prisoner “had his Clergy”, this was a bar to all further proceedings: sometimes, however the court if dissatisfied with the verdict delayed to call the prisoner up for judgment or, to the same effect, reserved judgment

on the application for clergy and left it open to bring an Appeal. Cases have been known where after a conviction for manslaughter, the prisoner has been tried on an Appeal of Death, and found guilty.

A conviction for murder did not bar an Appeal: of course, if execution followed there was no need of an Appeal—but if there was a pardon or commutation, sometimes the right was exercised.

The cases were not very rare in which after an acquittal by a jury on an indictment, an accused has been convicted on an Appeal of Death. In such a case the Crown could not exercise any prerogative of mercy: if the Appellor asked for execution—the request must be made in person—the sentence “quod suspendatur” must needs be carried into effect.

The anomaly of a man accused of the death of another and acquitted being afterwards tried by another jury for the same alleged offence was not wholly unnoticed—the maxim of law, *Nemo bis vexari debet pro eadem causa*, was violated with the result of death to some.

The matter of Trial by Battel received attention in Parliament for the first time, so far as is known, in the reign of King James I and in reference, however, only to civil cases on writs of right.

From the Journals of the House of Commons,³⁴ the following appear:—16 20/21 Feb. 28, An Act for abolishing of Trial by Battle or Combat. Bill read.

Further proceedings were had March 13 and 23 but nothing further was done at that session.

From the Journals of the House of Commons,³⁴ the following was read the second time March 17, and dropped March 29, 1623, the Commons having considered it March 22.

Again in 1629 a Bill received two readings and was dropped.

All these proceedings, however, contemplated the abolition of Battel only in the civil action of writs of right concerning the ownership of land.

The same matter came on for discussion in the Commons, February 25 and March 11, 16 40/41, and July 23, 1641.

³⁴The JOURNALS OF THE HOUSE OF COMMONS, ponderous folios in the Library at Osgoode Hall, Toronto, the property of the Law Society of Upper Canada bear the book-plate of William Osgoode, first Chief Justice of the Province of Upper Canada, 1792-1794.

The Appeal of Murder does not seem to have received attention in Parliament until April 29, 1774, when the Bill for the Administration of Justice in Massachusetts Bay was in Committee of the Whole.³⁵ Dunning (afterwards Lord Ashburton) opposed the removal of "that great pillar of the Constitution, the Appeal for Murder" and feared that "a precedent should be instituted in order to operate as an example for the taking it away in Great Britain as well as the Colonies".

Wedderburn and some others supported the clause in the Bill abolishing Appeal of Murder in the Colony but the great weight of opinion was that the colonists should have the same laws as in England and the clause was withdrawn—some of the members, notably Charles James Fox, expressing the opinion that the right should be abolished in England.

More than forty years thereafter, the matter was brought to an issue and finally decided.

Abraham Thornton³⁶ was tried at the Summer Assizes, 1817, at Warwick for the murder of Mary Ashford: there were strongly suspicious circumstances but he was acquitted: thereupon William Ashford her eldest brother lodged an Appeal of Murder as her heir-at-law: Thornton, called on to plead, pleaded Not Guilty, that he was ready to defend himself by his body, took off his glove and threw it on the floor of the court. The Appellor replied that there were violent presumptions of guilt and that therefore the Appellee should not be allowed the duel: the Appellee answered that there were more violent presumptions of his innocence. The Court of King's Bench held that where the Appellee claimed the right to defend himself by his body, to oust him of this right the Appellor must allege such violent presumptions of guilt as to leave no possible doubt in the mind of the court, that it was not sufficient simply to state strong grounds of suspicion. The Appellor then dropped his Appeal.

This case attracted great public attention: while within the half century there had been an Appeal of Murder lodged,³⁷ it had not

³⁵17 COBBETT'S PARLIAMENTARY HISTORY, coll. 1291, sqq. Dunning afterwards changed his opinion.

³⁶The story has been told scores of times—enough for our purpose will be found in *Ashford v. Thornton*, 1 B. & A. 405.

³⁷*Bigby v. Kennedy* (1770) 5 Burr. 2643; 2 W. Bl. 713. see in the text, *post*: also *Rex v. Taylor*: *Smith v. Taylor*, (1771) 5 Burr. 2793. In the lat-

been proceeded with: and there had not been a Wager of Battel in such a case for centuries.

Several writers took the matter up, amongst them a very able author, Mr. E. A. Kendall, F. A. S., whose brochure, "*Appeal of Murder*"³⁸ went rapidly through three editions: it did as much as anything else to illuminate the subject.

The whole matter of determining rights by physical prowess came up for discussion as well as the right to appeal of crime and it was determined to put an end to the whole system.

In the session of 1818, the Attorney-General, Sir Samuel Shepherd, had given notice of a motion in the House of Commons but had not moved.

Marmaduke Lawson, M. P. for Boroughbridge, a new member of the House, early in the session of 1819 gave notice of a bill to repeal the law respecting trial by Battle; but Monday, February 1, 1819,³⁹ he consigned his motion "to the more able hands of the Attorney General (Sir Samuel Shepherd) and that learned gentleman accordingly gave notice of a motion on the subject for Tuesday night."

One Tuesday, February 9, Shepherd submitted his motion and obtained leave to bring in a Bill. He pointed out that under the existing law "every individual would have it in his power not only to be the avenger of his own wrongs but the arbiter and often the unmerciful arbiter of the life and happiness of others * * * contrary to every principle of justice * * *; when a party had once been tried and acquitted he never should undergo the ordeal of a second trial for the same offence * * * demanded by dissatisfied or revengeful parties * * * But the great evil of the Wager of Battle had been that it gave to a vindictive party a power he never should have had and that, without the possibility of the slightest interference on the part of

ter case the Appellee had been convicted of manslaughter and "burnt in the hand"—this was held a bar to the widow's Appeal. The Appellee was a Scottish sergeant who at the time of the homicide said that he "did not mind killing an Englishman more than eating a mess of crowdy."

³⁸AN ARGUMENT FOR CONSTRUING LARGELY THE RIGHT OF AN APPELLEE OF MURDER TO INSIST ON TRIAL BY BATTLE * * * by E. A. Kendall, Esq., F. A. S., Third (best) Edition, London, 1818.

³⁹39 HANSARD, col. 202—subsequent proceedings, coll. 415, 416, 417, 428, 434-6, 1097-1105, 1116, 1120, 1121.

the * * * Crown * * * dealing justice in mercy * * * In fact vengeance or avarice were the judges to decide with Wager of Battle * * *

The Attorney General was supported by Thomas Denman, M. P. for Wareham (afterwards Lord Denman, C. J.) and Ralph Bernal M. P. for Lincoln; and the Bill was read the first time. Some unfavorable comment was made in the House of Lords: but the bill was read the second time, February 12, and committed, February 15. On the debate to commit opposition appeared, Sir Francis Burdett, M. P. for Westminster contending that one part of the laws of Appeal should be saved, that is the Appeal of Murder—this he “considered * * * necessary as a protection against an undue exercise of the power of the Crown in pardoning persons convicted of murder”. Sir James Mackintosh, M. P. for Kuaresborough, replied and said that Burdett’s objection “rested on no better authority than the observations of Junius upon the case of the Kennedies”.

“The Kennedies” were Patrick and Matthew Kennedy who were in March, 1770, tried at the Old Bailey for the murder of a watchman, Bigby, on Westminster Bridge: found guilty and sentenced to death, they were pardoned on condition of transporting themselves for life. Their sister was the mistress of Lord Sandwich and it was openly charged that it was the political influence of Sandwich which procured them this mercy. The widow Mrs. Ann Bigby, apparently at the instance of political opponents of the government, lodged an Appeal of Murder against them at the May Sessions. Patrick was in Newgate and Matthew actually on board a convict ship to be transported: they were both placed in the King’s Bench prison in order to plead at the November sessions. They were set to the bar but the widow did not appear and a nonsuit was accordingly entered.⁴⁰ Many attempts had been made to have the widow relent but in vain: at length the worldly-wise Sandwich (or according to some accounts, Dunning, afterwards Lord Ashburton, counsel who had been retained) advised to “count out the gold before her, throw it into her lap and see if she will refuse it”. The experiment was tried, 500 guineas (or £350, the accounts vary) in gold were poured into her lap and she did not refuse it.

⁴⁰Bigby v. Kennedy (1770) 5 Burr. 2643: 2 W. Bl. 713.

Junius was unsparing in his comments⁴¹ and that Mackintosh was right in considering the opposition to the bill to be based upon Junius' criticisms is shown by the debate after the Bill was reported.

On March 19, Burdett made a further onslaught on the Bill as to Appeal of Murder only, "because it went to check the illegal exercise of the power of the Crown in pardoning criminals * * * in cases of murder": he claimed, absurdly enough, that the Statute 2 of Edward III expressly prohibited the pardon of murderers "except in cases of self-defence"!! Referring to Junius' comments on "the case of the Kennedies", he said: "If the sister of these men * * * had been honest, her brothers would have been hanged".

The Kennedy case was made the most of by Serjeant John Singleton Copley, M. P. for Ashburton, (afterwards Lord Lyndhurst, L. C.) to show the mercenary mischief of the system. Charles Tenyson, M. P. for Grimsby, thought the repeal should not apply to pending cases. The Bill was upheld 86 to 4. On March 22, Sir Robert Wilson, M. P. for Southwark, spoke against the abolition of the Appeal of Murder (as did Alderman Mathew Wood, M. P. for London) desiring to continue "the right of appeal to a jury against the prejudiced verdict or an unwarranted pardon;" but the Bill passed 64 to 2.

There appears to have been but one petition in the matter, that of Mr. John Thetwell of Lincoln's Inn Fields, Gentleman, against the abolition, presented March 22—the petition is declamatory rather than argumentative.

On Friday, June 18, the Lord Chancellor, Lord Eldon, brought the Bill up in the House of Lords.⁴² He said that there had been no opposition to the abolition of Wager of Battle in civil cases but only "in cases that resembled criminal proceedings". There had been two

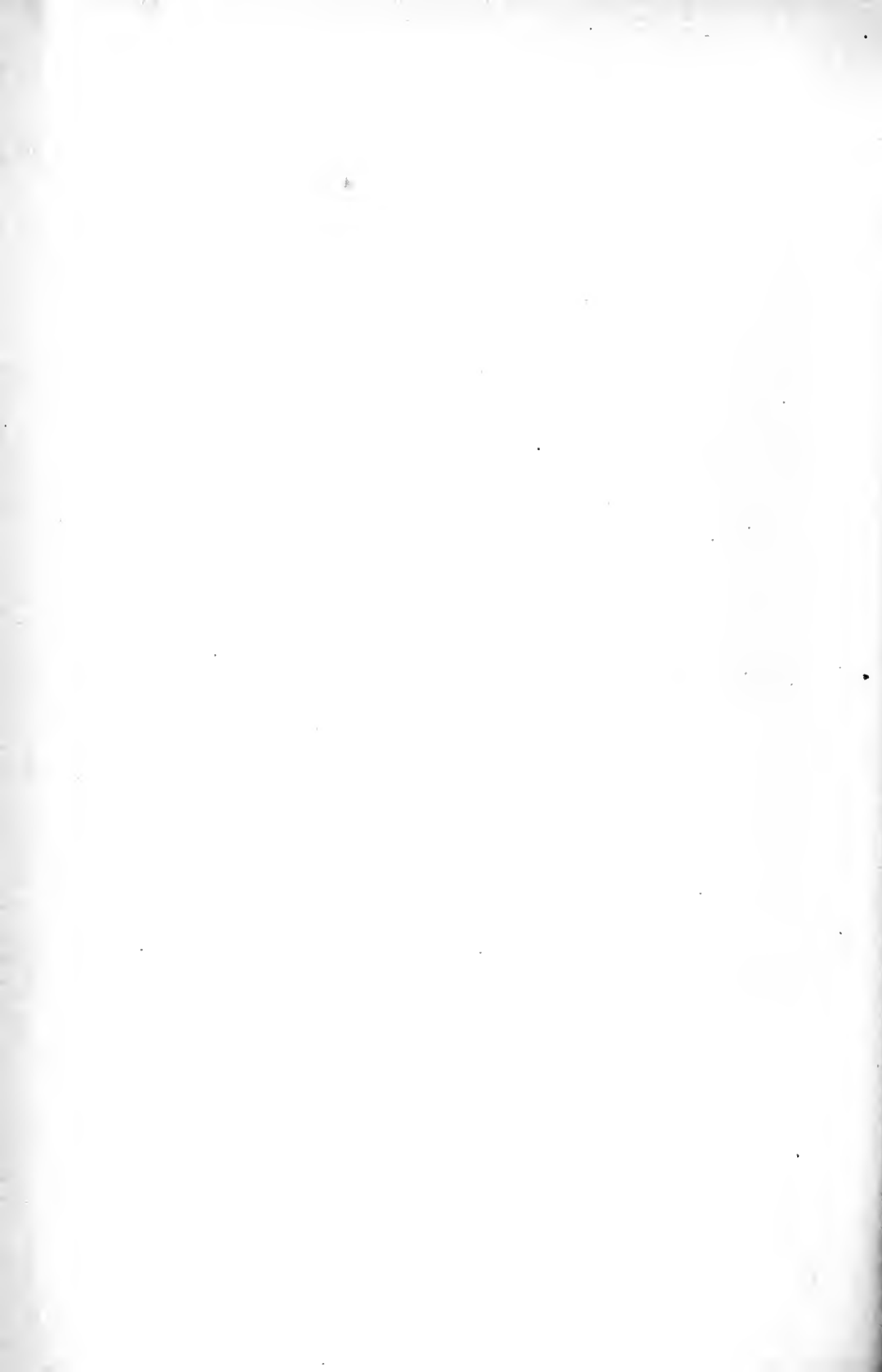
⁴¹Junius does not expressly mention Sandwich or Miss Kennedy: but everybody knew whom and what he meant. In his letter to the printer of the *PUBLIC ADVERTISER* of May 28, 1770, he speaks "of the odious abuse of the Prerogative * * * the mercy of a chaste and pious Prince extended cheerfully to a wilful murderer because that murderer is the brother of a common prostitute would I think at any other time have excited universal indignation * * *" JUNIUS: *STAT NOMINIS UMBRA*, Woodfall, London, 1772, vol. 2, p. 107. He mentions Lord Sandwich at p. 66; of course his whole object was to discredit the administration of the Duke of Grafton.

⁴²40 HANSARD, coll. 1203-1207: 157; 1576.

petitions to the House, one being from the City of London that Appeals in criminal cases should not be abolished—he pointed out that by their charter, the citizens of London could not be compelled to accept of Wager of Battle, which meant of course that such Appeal must in London needs be tried by a jury. He quoted somewhat extensively from “Mr. Kendal’s learned and able work on this subject” and made a strong presentation of the justice and necessity of the proposed Bill. There was no opposition: the Bill went through the committee and was duly passed without opposition at any stage: on July 17, 1819, the royal assent was given by the Prince Regent and the Bill became law.

This Act (1819) 59 George III, c. 46 is entitled “An Act to Abolish Appeals of Murder, Treason, Felony or other Offence and Wager of Battle or Joining Issue and Trial by Battle in Writs of Right;” and the title accurately sets out its effect.

The extraordinary feature in connection with this repeal is that it was the least defensible part of the existing law which was alone insisted on by the Opposition.



DIOSCORIDES AND HYDROPHOBIA*

HONORABLE WILLIAM RENWICK RIDDELL, LL.D.,
F.B.S., EDIN., ETC.

Toronto, Canada

The most celebrated of all the works of the ancients on *materia medica* is the *Peri Hules Iatrikes* (concerning *materia medica*) of Dioscorides.

Dioscorides (1) was born in Anazarbus in Cilicia and flourished apparently about the time of Nero in the second and third quarters of the First Century, A. D.

His work is substantially a herbal though there are a number of mineral and animal substances also mentioned and described; and it more than held its own for sixteen or seventeen hundred years. It cannot, indeed, boast of scientific or logical arrangement, the description given of plants when any description is given—for in many cases we have only the name or names—is generally defective, and sometimes contradictory or unintelligible. He falls far short in many respects of Theophrastus (2) of Erasos four centuries before; he was, however, writing a practical not a scientific treatise. For his times, it was reasonably exhaustive, describing, as it does, seven hundred plants, more than ninety minerals and one hundred and sixty-eight animal substances, not far from one thousand in all.

It has been made a matter of reproach that he ascribes too many virtues to one and the same substance; but that is the case with practically all herbalists—for example in the well known herbal of Nicholas Culpeper (3), the author frequently fills a quarto page with his enthusiastic enumeration of the virtues of an English plant.

At the present time the chief value of Dioscorides'

*Read before the University of Toronto Medical Society.

elaborate treatise is historical as showing the kind and extent of materia medica knowledge in his day. There are five books of undoubted general authenticity, although there are probably a number of interpolations in them. A sixth book on Alexipharmics and a seventh on Theriaca (4) are added. The authenticity of these has been doubted but without much real ground for the doubt.

Of course the work was translated into Latin and printed—the best edition is said to be that of Sprengel in Kühn's Collection of Greek Physicians, Leipsic, 1829; but I have found an earlier edition wholly satisfactory, and, for an amateur at least, more interesting. The celebrated Joannes Ruellius (5) translated it into Latin and it was published in quarto form at Frankfort in 1543, under the editorship of Dr. Walter H. Ryff (6) who added many valuable and illuminating notes, the Scholia of Joannes Lonicerus (7) with Greek, Latin, Hebrew and German nomenclature being added—this is the edition I use.

The fact that Dioscorides attributes to one and the same plant many virtues has already been mentioned: this, of course, implies that for the same therapeutic effect any one of many plants is effective. For example, I have counted about seventy-five plants which are relied on to counteract the bites of venomous serpents, while there are literally hundreds of diuretics, laxatives and emmenagogues, cholagogues, vulneraries and styptics.

Some of the effects are at least interesting, e. g., if anyone chews anchusa and spits in a serpent's mouth, he will kill it; if one wear an amulet of spina alba, it is said it will drive away serpents—so will calaminth, peucedanum, cedrus and the stone gagates; while the juice of old elms mixed with anise and wine and rubbed on the threshold will keep them out, and "they say" lychnis placed near them at once renders them torpid and inert; "they say," too, that serpents cannot harm deer which eat elaphobos.

Witchcraft is kept away by branches of the rhamnus placed in the windows and the plague by sativa

angelica; if children eat, roasted, "the mice that run around the house." it will cure slobbering—"if you dissect young swallows as soon as they are hatched, in a waxing moon, you will find in their belly two stones, one particolored, the other white—these not being allowed to touch the ground but tied in calf's hide or deerskin to the arm or neck will be of much assistance to epileptics and will often cure them at once." That is not the only wonderful thing about young swallows, for "some say that if young swallows are blinded the mothers will restore their sight by the application of the herb chelidonium." "Theophrastus says that if anyone puts pumice stone into a pot of boiling wine, the heat is at once abated." "The little worm from the heads of dipsacum or Venus' lip tied in a little sac to neck or arm is helpful as a remedy in quartan fevers," and "they say, that if anyone carries a polemonia root, he will not be bitten by a serpent, or, if he is, it will do him no harm"—this will make it less wonderful that the plant if chewed relieves toothache. In these post-O. T. A. and posteighteenth amendment days, it may be well to know that if the seats be sprinkled with water from the sacra herba, "banquets become more joyous."

It is well known that "medical men use mandragora when there is need of knife or cautery;" but it is not so well known that there is so much poison in the taxus of southern France (*gallia narbonensis*) that it injures and very often kills those who sleep under it—or *phyteuma aut leontopodium ad amatoria convenire et prodesse*. "Take a hair of the dog that bit you"—"the mus auranus dissected and applied extracts the poison of its own bite" and canine urine helps in dog bites; and if psyllium, flea-wort, is growing in a house, fleas cannot remain (8).

There are enumerated seventeen plants good for the toothache and eighteen for hydrophobia.

Hydrophobia which is the subject of this paper, Dioscorides treats of at length in his sixth book, of which Chapter XXXV, *Signa rabiosi canis & demor-*

sorum ab eo, I here translate as literally as the idioms of the two languages permit.

CHAPTER XXXV

SYMPTOMS OF THE RABID DOG AND OF THOSE BITTEN BY HIM

We have begun with the bite of a rabid dog because that animal is usually domestic and is more frequently attacked by and dies of rabies: consequently it is difficult to avoid it, and so there is great danger for man unless he uses many precautions.

The dog is generally carried into rabies by very great heat—although sometimes as many receive it through cold weather. The rabid animal avoids drink and food, much frothy phlegm (9) flows from nostrils and mouth, he looks savage and more gloomy than usual, he everywhere attacks every living creature without barking and bites all whether man or beast, familiar or strange. There follows no immediate injury except the pain from the wound; but later on, that disease which from fear of water is called by the Greek word “hydrophobia” appears.

It begins with tension of the nerves (10), rubor of the whole body particularly of the face, accompanied by perspiration and a sort of languor; some avoid the glare of day, others without any pain find difficulty in drinking. There are some, too, who bark like a dog and bite those they meet, thereby affecting them with the like disease. Of all who have had this disease, we have never seen a single individual escape death. We have, indeed, read of one here and there who escaped—at all events, Eudemus (11) asserts that a certain man survived. Some say that Themiso (12) being bitten was attacked by this disease and escaped; but others say that he was professionally attending a friend who had hydrophobia and that through the sympathetic concord of their natures he himself contracted a like affection; but afterwards after much suffering, he survived. This is a most malignant disease from which before they were at-

tacked by it, we have saved many and we have known of many who have been saved by other physicians.

Then follows:

CHAPTER XXXVI

REMEDIA DEMORSORUM A CANE RABIOSO

Treatment of those bitten by a rabid dog.

There are two methods of treatment, one, general to be used in all bites of poisonous animals, the other, particular, and especially for those who are bitten by mad dogs; this for some is of the utmost value, but for others useless, especially for those bitten a long time before.

We shall first explain this latter treatment and then go rapidly through the general method.

It is necessary, then, to cremate river crabs (13) in branches of the white vine and, triturating the ash as fine as possible, keep it on hand, and also keep on hand gentian root, powdered and sifted; then whenever anyone is bitten by a mad dog, let two spoonfuls of the crabshell ash and one of the gentian be put in four cupfuls of pure wine and drunk like gruel four times a day.

This is the treatment to be followed if the patient has just been bitten; but if two or three days have elapsed from the bite we recommend three times the weight in addition.

This is the best treatment for those bitten by rabid dogs; it is sufficient alone in most cases and may be employed with confidence. But that we may protect the rest against imminent peril, there is no reason why the other methods should not be employed. And it would be far better for a patient even if he had confidence in the one, to suffer the excruciating pain of medicaments rather than to run into danger through neglect and indifference.

In the case of those bitten by a rabid dog, larger wounds are not so much to be feared as the smaller and those which are like small ulcers of the skin, as

the blood coming copiously from a larger wound can carry with it some of the poisonous fluid, which does not happen in the smaller wound. In smaller wounds, it is necessary to draw back the surrounding flesh, to pare the lips with a sharp scalpel and seizing the flesh with hamulus or vulsella (14), to amputate it. In every case, the parts around the wound are to be scarified, so that there may be a more copious flow of the blood and thus prevent the poison insinuating itself into the members. Cupping assists in this treatment as thereby the power of the poison is drawn out. Around the poisonous wound, cauterization is the speediest help because as fire is more effective in its powers than all else, at the same time that it dominates the virus by its force and the pain goes no deeper than the iron, at that same time the part which has felt the fire furnishes no ordinary foundation for future treatment, the ulceration continuing to drip for a longer time. From the time that crusts begin to form, care must be taken lest the lips of the ulcer close and form a cicatrix; and if possible the ulcerations and foul wounds threatening inflammation should be kept off for a long and definite time.

The best topical application for these is a *salsamentum* (15) and ground field garlic and onion and its juice particularly what is called Cyrenian or Median or Parthian onion; wheat ground or unground is to be applied if the wounds gape by deep effusion.

If, as often happens, cicatrices close before the time set, they do harm and require an operation; for it is proper to open them and pare the flesh around with a scalpel or apply the actual cautery again. When the time set has passed, the wound is to be brought to a cicatrix and the surrounding parts treated with a plaster of salt and not long after with a sinapism.

CHAPTER XXXVII

RATIO UICTUS IN MORSU RABIOSI CANIS

In the following Chapter XXXVII, *Ratio uictus in morsu rabiosi canis*, after recommending wine, raisin

wine and milk for ordinary drink, onions, garlic and leeks as food, theriaca mithridate (16) or mixed with eupatorium and aromatics as medicine, the author continues:

It is well to know that fear of water does not set in at any fixed and definite time; for the most part, in those who neglect to take proper treatment, the attack is deferred to the fortieth day, some are attacked even after half a year; in one case which was brought to our knowledge, the fear of water appeared after a year—they say that some have been so attacked after seven years (17).

We have already given the treatment in the early stages. If the remedies we have referred to are not applied, it is not worth while to pare the wound with the scalpel or to try cauterization for they cannot draw out what has now made its way in—there is no occasion, no use, in employing such treatment for in vain would the body be subjected to pain.

Another method of treatment presents itself—purg-ing furnishes a great help since by powerful purgatives the habit of the body is wholly changed—the hiera which contains colocynth (18) and curdled milk both effects purging and also can master the poison. And food, reasonably pure wine, by which the force of the venom is much blunted, should be taken every day. Moreover, perspiration is to be forced before and even after meals and dropacisms (19) and sinapisms applied alternately over the whole body. But by far the most efficacious medicine is recognized to be hellebore which can be used with confidence not now and again only but very frequently before the fortieth day and even after that time. This remedy is said to have such power that those who have already begun to experience fear of water, if they take hellebore as soon as they feel the onset of the disease, at once are saved. No man can ever save those who are actually seized.

In the Scholium to this chapter it is pointed out that no less an authority than Galen himself (20) gives a perfectly satisfactory treatment for hydro-

phobia—he should not, however, receive full credit for it as he learned it from his fellow citizen and preceptor, Aeschrion (21).

Galen says: Gather river crabs in the summer time after the rising of the Dogstar, when the sun is entering the constellation Leo on the eighteenth day of the moon: bake them alive in a crucible of copper until they are so far calcined as to be easily comminuted and ground to powder. Of this powder let the patient take one spoonful a day in water if he begin immediately after the bite or two spoonfuls if he does not begin till some days after—this to continue for forty days.

Or mix ten parts of this crab powder with five of gentian and one of olibanum and give one spoonful per day to the patient in water. Apply to the wound, the following prescription:

℞ Picis Brutiae	℔b. j
Opoponacis	ʒ iij
Aceti Acerrimi	Coch. ij.

Galen says that no man who made use of these medicaments had ever died. Paulus Aegineta (22) warns physicians not to let the wound heal too soon—some by treating the wound closed it prematurely when the hydrophobia did not speedily appear and that was the reason that although the fear of water did not appear at once, it came on afterwards. In most cases this symptom appears in about forty days but sometimes not till after six or even seven months.

No little attention was paid to the determination of the fact of rabies in the dog thought to be mad. Dioscorides does not furnish us with any pathognomonic indicia or any symptoms beyond what has already been set out: but later writers went much further and gave perfectly differentiating indicia. How to determine whether the dog that bit was rabid, Paulus Aegineta (22) shows very plainly and concisely—it was not, however, his own discovery, he took it from Oribasius (23). Here is the recipe. Carefully contused walnuts are to be applied to the wound for a day after the bite—then thrown to a

cock or a hen. If it do not eat the nuts, starve it till it does; then, when it has eaten the nuts, if the dog was not rabid the bird will live, but if it was, the bird will die the next day.

Paulus thinks the fear of water in those suffering from hydrophobia is due to the immense dryness of their body which is antipathetic to what is wet: but some think this is due to their imagining that they see in the water the image of the dog which bit them.

Paulus adds that the persons here and there who have been cured of hydrophobia were not bitten by dogs but by other men: From this it may be understood that the poison of a mad dog is the very worst of all. Before they actually fell into fear of water, however, it is proved that many have been saved by treatment.

There were believed to be other prophylactic measures which might be taken. Dioscorides tells us that the liver of a dog affected with rabies, roasted and eaten by those he has bitten, is credited with saving them from hydrophobia—some, too, to prevent that fear of water, make use of the tooth called canine—taking this tooth from the dog which bit them and putting it in a little sack, they tie it on their arm as an amulet (24) (by the side of this, it is a mere trifle that an old liver long salted and taken in hydromel expels the *secundæ*). Galen does not agree as to the dog's liver—some, he says, using it lived but some died (25). In the treatment of the bite, Dioscorides gives a wide range. He advises the juice of lycium or *pyxacantha* taken as a potion with honey: a plaster of walnuts with onions, salt and honey applied to the abdomen: the flesh of the fish called *mituli* applied to the wound; a salt pickle of the fish called *smarides* or the salt sauce called *garum* from any fish: canine blood as a drink: canine urine with nitre topically applied: honey licked up or drunk: leaves of the *plantago* as a plaster: juice of leeks with honey drunk or applied: *alyssum* eaten as food: onions with honey and ground pepper as a lotion: the leaves of the *cynoglossus* with old hogs' lard (which by the

way heal baldness as well as burns): leaves of the sambucus very tender and soft as a poultice (this also is good for burns): acida muria called by the Greeks, oxalme, injected into the wound hot and at once: Lemnian earth: nitre with asses' or hogs' fat and vinegar: ash of vine twigs as a wash with vinegar—I omit the medicines which are applicable to other bites than those of mad dogs specially (26). It is rather strange that Dioscorides does not make more of the alyssum which received its name from its supposed quality of heating or preventing canine madness—Galen is very strong that experience proved it equal to its name (27). It may fairly be said that if the assertions of Dioscorides and Galen as to the effect of their remedies were well founded, any one who died of hydrophobia had only himself to blame—but were they?

NOTES

1. The life of Pedanius Dioscorides is well written in Anthon's *Classical Dictionary*, Harper's, N. Y., 1871, pp. 448, 449; the author shows full appreciation of the work of Dioscorides and quotes largely from medical authorities. See also Bass: *History of Medicine*, Dr. Handerson's Edition, N. Y., 1889, p. 159, which places him A. D. 40-90, quite too early as I think.

2. Theophrastus of Erasmus in the Island of Lesbos, born 382 B. C., a Peripatetic philosopher and teacher, the tutor of Erisistratus, the celebrated physician. His *Characters* is still well known. Of his many scientific works, the best is *Peri Aition Phutikon*. Of the Causes of Plants, a system of plant physiology. He wrote also on Law, Mineralogy, Metaphysics, etc. See Anthon, *op. cit.*, pp. 1231, 1232; Bass, *op. cit.*, p. 118.

3. Nicholas Culpeper's *English Physician and Complete Herbal*, first published in 1653, was frequently republished. A small 8 vo. edition of 1770 is useful; but the best edition is the sumptuous 4to of 1789, edited by the astrologer and Modern Freemason, Dr. E. Sibley. There are 413 plants described. For hydrophobia, he recommended allheal (heraclea), angelica, brawm, betony (this also against witchcraft), dwarf elder, eglantine, fig, garlic, hound's tongue, lungflower, mint nettles, pimpernel, moonwort, mad wort and a wonderful solar tincture. Culpeper (1616-1654) was an astrologer as well as a physician: the first edition of his famous book appeared in 1653; a new edition by Uriah Cole appeared in 1661: others in 1668, 1802 and 1803; the only

edition of his complete works was edited by Dr. Gordon, and appeared in 1802. See 13 D. N. B., pp. 286, 287. Bass, *op. cit.*, p. 526.

4. Alexipharmics, medicines to prevent poisoning, prophylactics: theriaca—a medicine to cure poison, particularly that of beasts. But the words were often used indiscriminately.

5. Joannes Ruellius—Jean Ruelle (1474-1537), known to Bass, *op. cit.*, p. 435, and the *Bibliographia Britannica* as a Veterinary—*Veterinari Medicinæ Libri duo*, Paris, 1530; Basle, 1537.

6. Dr. Walter Herman Ryff (or Reiff), a physician and surgeon of Strassburg, about 1545, an eminent author of textbooks on anatomy and surgery and also brewing—the first anatomy in German. The present work shows much learning. See Bass, *op. cit.*, pp. 420, 429.

7. Joannes Lonicerus is unknown to fame and the dictionaries.—See Note 17, post.

8. Anchusa, Lib. 4, c. 21, pp. 299, 300. Spina alba, Lib. 3, c. 12, p. 203; Calaminth, Lib. 3, c. 33, p. 217; Peucedanum, Lib. 3, c. 74 p. 242; Cedrus, Lib. 1, c. 89, p. 51; Gagates, Lib. 5, c. 92, p. 418; Lychnis, Lib. 3, c. 96, p. 253; Elaphoboscum, Lib. 3, c. 64, p. 236; Rhamnus, Lib. 1, c. 102, p. 58, Sativa angelica, Lib. 3, c. 63 (n), p. 236; Mus, Lib. 2, c. 61, p. 116; Swallows, Lib. 2, c. 47, p. 113; Pumice, Lib. 2, c. 173, p. 191; Dipsacum, Lib. 3, c. 11, p. 293; Polemonia, Lib. 4, c. 7, p. 293; Sacra Herba, Lib. 4, c. 51, p. 314; Mandragora, Lib. 4, c. 65, p. 324; Taxus, Lib. 4, c. 68, p. 327; Phytuma, Lib. 4, c. 114, p. 349; Leontopodium, Lib. 4, c. 115, p. 31457; Mus Araneus, Lib. 2, c. 60, p. 116; Urina canina, Lib. 2, c. 73, p. 125; Psyllium, Lib. 4, c. 60, p. 320.

9. The word is "pituuta," phlegm, rheum, one of the four humors.

10. Or tendons.

11. Eudemus or Eudamus, the name of several Greek physicians whose identification is very difficult.

12. Themiso or Themison, a celebrated physician born at Laodicea, a pupil of Aesclepiades. He came to Rome about 90 B. C. He took a middle course between empiricism and dogmatism, a real eclectism. He may be regarded as the founder of the school of Methodists which indeed became as dogmatic as the Rationalists. Themiso insisted on dyscrasia of the whole body not of the humors alone as the cause of disease. He was the first to use leeches which he applied to the temples in disorders of the head. See Anthon, *op. cit.*, p. 1313; Bass, *op. cit.*, p. 140.

13. In Lib. 2, c. 9, p. 99, *Canceri*, Dioscorides says: "The ash of river crabs cremated (exustorum), two spoonsful with about half the amount added of gentian root drunk in wine for three days is extremely useful in bites of a mad dog; in a decoction with honey, it alleviates cracks in

the feet and seat, also chilblains and carcinomata; ground raw and drunk with asses' milk, crabs help against bites of serpents and spiders; cooked and eaten with the juice they help those affected with tabes"

14. Hamulus, a small hook: vulsella or volsella, tweezers, or pincers.

15. Salsamentum properly a salty sauce, but applied to saline washes, lotions, etc. We have an English word, salsamentarius.

16. Theriaca. There were a score of Theriacas and Mithridates without number. Charas gave the formulas for three Theriacas: a. Theriaca Andromachi senioris containing sixty-four ingredients (pp. 225-230). b. Theriaca diatesseron of Diatesseron, Honey and Juniper berries "invented especially for the poor," pp. 237, 238, and c. Theriaca reformata Domini d'Aquin of thirty-six ingredients (pp. 230-237). The first and third contain vipers. Charas also gives the mithridatium Damocratis of forty-eight ingredients (pp. 238-244). All these are prophylactic against and a cure for all poisons.

17. Joannes Lonicerus wrote *Scholia*, i. e. Notes, to the various Chapters of Dioscorides, which *Scholia* are printed as Addenda in this edition. He points out that Paulus Aegineta advises that before all else, care must be taken to keep the wound open. He says that while the fear of water generally sets in about the fortieth day, sometimes it does not appear for six or even seven months. The scholiast quotes further from this author as to the symptoms, etc., *Scholia*, Lib. vi, cc. 36, 37, pp. 84, 85.

18. Hieria containing colocynth. Hieria is a purgative generally containing aloes and in many cases also colocynth.

19. Dropacism, pitch plaster.

20. Galeni *De Simpl. Medic. Facult.*, ii, 10; p. 356 of Vol. 12 in Kühn's Edit., Leipsic, 1821-1830.

21. Sometimes called belops. See Art. *Aeschrion* iii, in Anthon's *Classical Dictionary*, p. 1,418. This formula met the approval of Galen and Oribasius.

22. Paulus Aegineta, a celebrated Greek physician born at Aegina probably in the 7th Century: he studied medicine at Alexandria and fully accepted Galen's theory of Humors. He was, however, independent in his views and has been considered the equal of or even superior to Celsus; he is the last of the great Greek physicians. Eminent as he was as a physician, he was more so as a surgeon. One of the most interesting as it is the most curious of his Chapters is that on the different kinds of arrows used by the ancients and the wounds they inflicted. His chief work is *An Abridgement of All Medicine* in seven books, which has been frequently republished. In Greek, the Aldine edition, Venice, 1528, and in Latin the Lyons edition, 8 Vo., 1567, with

many learned annotations, enjoy the highest reputation. See Anthon, *op. cit.*, pp. 24, 25. Bass, *op. cit.*, pp. 205-208.

23. Oribasius, an intimate of the Emperor Julian, born at Sardis or Pergamus (the birthplace of Galen)—he studied medicine under Zeno and became court physician to Julian and who took him with him to Gaul, A. D. 355, also on his fatal Persian expedition, A. D. 363. He followed Galen so closely in his theory and practice that he was called the Ape of Galen: he appears to have been the first to bleed by scarification: his use of the oil bath was constant, and his treatment of epilepsy by drastic purgatives, colocynth, scammony, hellebore, etc., followed by occipital cupping and sinapisms had a great reputation. He wrote much on medicine, anatomy, etc., but we have no complete edition. See Anthon, *op. cit.*, pp. 924-6;; Bass, *op. cit.*, pp. 185, 186.

24. Lib. 2, c. 39, p. 40. "Take a hair of the dog that bit you."

25. Scholia, Lib. 2, c. 38, p. 29.

26. Lycium, Lib. 1, c. 114, p. 65; Walnuts, Lib. 1, c. 141, p. 87; Metuli, Lib. 2, c. 4, p. 76; Smarides, Lib. 2, c. 26, p. 106; Garnum Lib. 2, c. 30, p. 107; Canine blood, Lib. 2, c. 71, p. 114; Canine urine, Lib. 2, c. 74, p. 125; Honey, Lib. 2, c. 74, p. 126; Plantago, Lib. 2, c. 119, p. 154; Alyssum, Lib. 2, c. 143, p. 169; Onions, Lib. 3, c. 87, p. 249; Cynoglossus, Lib. 3, c. 162, p. 183; Sambucus, Lib. 4, c. 113, p. 348; Acida muria, Lib. 5, c. 13, p. 389; Terra Lemnia, Lib. 5, c. 63, p. 407; Nitre, Lib. c. 78, p. 14; Ash, Lib. 5, c. 82, p. 415.

27. Scholia, Lib. 3, c. 96, p. 52. "a," privative, and *lussos* (Latin form *lyssus*), mad.

It may be of interest to give the views of the celebrated Van Helmont on hydrophobia, its cause and treatment. In a volume published in London in 1683 entitled: *The Paradoxal Discourses of F. M. Van Helmont concerning the Macrocosm and Microcosm: or the Greater and Lesser World and Their Union*, he discusses amongst many other things—*de omnibus et quibusdam aliis*—the Dog and his love for his Master: at pp. (78) (79) we read:

"And is it not worth our taking notice, that when these internal waters in a dog, through divers causes, as hunger, over great heat or cold, are turned the contrary way and disordered, so that he cannot take his due rest: the Image of Love he had for his Master, is turned to Enmity: and by this means he grows mad, and becomes shy of the outward water (forasmuch as he is at enmity with his inward water the images formed out of it) so that he hates it, and cannot endure it; and that because his internal disordered waters are thereby put in motion? And whilst he is thus distempered, if he chance to bite another dog, beast, or man, or if he do but touch their skin with the foame

of his mouth, immediately the spirit of his perverted and disordered waters and image, doth enter into them, and causeth the same disorder in their waters, so that they in like manner become shie of the outward water.

Furthermore, it hath been found by experience, that the best means for curing this distemper is lightly to burn or cauterize the skin of the bitten man or beast with a small red hot iron or copper, and by this means to put them into a fright of fire, or else by plunging them well under water: for thus the outward fire or water spirit of the great world which stands in its due and right order, will be predominant over and master the disordered spirit of the little world, and turn about and set to right the disordered waters of the same. And is not this well worth our animadversion and consideration?

OSGOODE HALL.



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THE BRIEF

A LEGAL MISCELLANY

But where you feel your honor grip
Let that aye be your border.

—*Burns.*

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THE BRIEF

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No. 3

THE LAWYER IN EARLY TIMES

HON. WILLIAM RENWICK RIDDELL.*

An Attorney at law in most, if not all of the United States, not only conducts his client's case but also acts as Counsel on argument, trial, etc. A different rule prevails in England and in Ontario—the Attorney is silent in court and the Barrister does the speaking. This was not always the case—originally, as Blackstone points out, 2 *Commentaries*, 25, every suitor was obliged to appear in person, unless by royal license. This license, which in strictness should be by letters-patent, came to be granted as of course by the Justices in the Curia Regis or in Eyre—like every other license this involved a fee payable to the King, a considerable part of whose revenue was derived from his courts. The *Curia Regis Rolls of the Reigns of Richard I and John* recently published by the King's Printer, containing records from 1196 to 1203, have many entries of the appointment of attorneys in court and of actions conducted for plaintiff or defendant by attorneys. At this time the usual practice was for the client to appear in court and openly make the appointment; e. g. in Hilary Term, 1 John (1200) we have an entry: "*Bed'*—*Emma uxor Ricardi de Argentem ponit loco suo virum suum versus Henricum de Sarnebroc de placito assise ad lucrandum vel perdendum*"—"Bedford: Emma, wife of Richard of Argentem puts in her place her husband against Henry of Sharnbrook in a plea of Assize to win or lose."

*Justice of the Appellate Division of the Supreme Court of Ontario.

Sometimes more than one attorney is named—e.g., in the immediately preceding entry, Peter Corbecun puts in his place the Prior of Stollée (i.e. Studley) or Simon of Cotton or Richard of Antioch. Sometimes instead of coming into court, the client came before the king himself and made the appointment either for a particular suit or as general attorney. In Hilary Term, 10 Richard I (1199), we find: "*Sussex*—*G. filius Petri mandavit justiciariis quod abbas Sagieni posuit coram domino rege ultra mare Willelmum priorem de Arundell' ad lucrandum vel perdendum versus Brianum filium Radulfi . . . et de omnibus placitis . . . et querelis que habet in curia domini regis*" "*Sussex*—Geoffrey Fitzpeter (the Chief Justiciar) directs the Justices that the Abbott of Seez before our Lord the King beyond the sea placed William, Prior of Arundel to win or lose against Brian son of Ralph and in all pleas and complaints which he has in the Court of our Lord the King."

If the client was sick (*de malo lecti*) and sent an attorney, generally four knights (*milites*) were sent to enquire whether the sick man really approved of the attorney—the same thing was sometimes done in the case of a blind litigant. The Attorney (*attornatus, atturnatus, atornatus*) had the right to represent the client fully both in pleading and otherwise—and he was not as yet a professional man.

It was not until (1236) 21 Henry III, c. 10, that the absolute right was given to every suitor in the County Court, Trything, Hundred, Wapentake and Baronial Courts to appoint an attorney in all suits (another Act in the same sense was 1417, 5 Henry V). Attorneys in such Courts are mentioned in a statute against Maintenance (1275), 3 Edward 1 (Westminster the First) c. 33; and in pleas of Trespass in (1278) 6 Edward I (Statute of Gloucester), c. 8. In 1285 by the Statute of Westminster the Second (not the Third, as Blackstone has it: *Commentaries*, 3, 26), the king of his special grace granted to every suitor in any of his Courts,

in any County Court or Court Baron to appoint attorney—*“quidem attornatus vel attornati habeant potestatem in placitis . . . quousque placitum terminetur vel dominus suus ipsum amoverit”*—“which attorney or attorneys shall have authority in the pleas . . . until the plea is determined or his master (client) removes him.” (This is the origin of our rule that the retainer of a solicitor is exhausted on judgment entered, and without further instructions he has no right to take subsequent proceedings, e. g. to issue execution, etc.)

By this time the profession of attorney was becoming established—they became too numerous, indeed, for we find in 1402, the Statute of 4 Henry IV, c. 18 in the following terms: Reciting *“ . . . pur pleusours damages & meschiefs qont advenuz devaunt ces heures as diverses gentz du Roialme par la grant nombre des attornees nient sachantz, nprises de la loye come ils soloient estre pardevant”*—“by reason of sundry damages and mischiefs heretofore to divers persons of the Realm by the great number of attorneys, knowing nothing nor seized of the law as they were wont to be,” the statute then enacts that all the attorneys be examined by the justices and *“leurs nouns mys en rolle & ceux qi sont bons & virtuouses & de bone fame soient receux & jurrez de bien & loialment servir en leur offices & en especial qils ne facent nulle suyte en foreine countee & soient les autres attornees oustez par la discretion des ditz Justices & qe leur meistres ove queux ils feurent attornees soient garniz de prendre autres en leur lieux parensi gen le mesne temps damage ne prejudice adviegne a leur ditz meistres”*—“their names placed in a Roll and let those who are good and virtuous and of good repute be received and sworn well and truly to serve in their offices and especially that they will bring no suit outside their county—and let the other attorneys be ousted at the discretion of the said Justices—and let their masters (clients) for whom they are attorneys be warned to take others in their stead lest in the

meantime damage or prejudice may accrue to their said masters." This is the origin of our Attorneys' Roll, requirement of good moral character, and oath of office.

It is thought by some that notwithstanding the statute, occasionally—it is hoped, very seldom—some have got *leurs nouns en rolle* whose right to be considered *bons & virtuouses & de bone fame* was at least doubtful. But there is the Statute and Parliament had as much reason to believe it would be obeyed as Congress had in the case of the Volstead Act or the legislature of Ontario in the case of the O. T. A. However that may be, only those who are good and virtuous and of good repute have any right on the Roll and have not had for five hundred years and more.

A few years later by the Act of (1405) 7 Henry IV, c. 13, those who claimed that they had been erroneously outlawed were allowed to make an attorney instead of appearing in person in the King's Bench for relief, if they were too sick to appear.

Long before this time and indeed before attorneys became a profession, but at what precise time is uncertain, a class of men had sprung up who conducted oral proceedings. They "counted" (whence our "recounted") their client's side of the case and were consequently Counters: They were servants to the law, *servientes ad legem* and were consequently Sergeants: They discussed pleas and were consequently Pleaders—and were our Barristers.

They were not overlooked in the statutes: The Statute of Westminster the First (1275) 3 Edward I by c. 29, enacts that if any sergeant, pleader or other do any manner of deceit or collusion in the King's Court or consent "*de faire la en deceite de la Court & pur enginer la Court ou la partie*"—to do that in deceit of the court and to beguile the Court or the party—and is convicted thereof, he is to be imprisoned a year and a day and not thereafter to be heard to plead in court for anyone. Sometimes it seems to me Counsel in our own courts are perilously near incurring the

penalty of this statute in their attempt to engineer (engineer) His Majesty's Judges—*ergo, cavete, O fratres in Phi Delta Phi!*

The statute continues: "And if he be not a Pleader, he shall in like manner go to prison for a year and a day; and if the offence demand more grievous punishment be it at the King's pleasure." Again, *Cavete, O fratres in Phi Delta Phi!*

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A Pleader should be suspended if he takes a fee from both sides or says or does anything in contempt of the judge, or fails in other duties.

Perhaps enough has been said to indicate the state of the profession in mediaeval England.

PATRICK HENRY AND THE HORSE.

In a debating club in the University of Virginia was a young fellow who talked on all connections about the immortal Patrick Henry—"Give me liberty or give me death"—until it got tiresome.

One of the rules of the club was that the chairman could call on any man, give him a topic, when he must rise and make a speech about it at once. And one night a chairman thought he would fix that fellow with a subject he could not get Patrick Henry into. So he called on him, and gave out the subject, "Colic in Horses."

The young man rose, said he would not have chosen that topic, but would do his duty as he saw it.

"Colic in horses," said he, "is caused by fermentation of great masses of vegetable matter taken into the stomach. There the acids of the stomach work on that great mass and produce gas—gas in the stomach, gas in the intestine, gas swelling and swelling from stem to stern, seeking an outlet, until at last it bursts forth in the words of the immortal Patrick Henry, 'Give me liberty, or give me death.'"

AMERICA AND THE WORLD COURT*

RUSSELL D. GREENE.

President Phi Delta Phi Club of Boston.

We are living in a calm that has followed the greatest outburst of passion and hate in world history and it is well that we should pause in our busy lives to consider the abolition of war by the orderly process of law.

At the conclusion of the great World War a treaty of peace between Germany and the allied and associated powers was negotiated at Paris and signed at Versailles on June 28, 1919. This treaty was formally ratified January 10, 1920. Article 14 of part 1 of that treaty provided as follows:

“The Council shall formulate and submit to the members of the league for adoption, plans for the establishment of a permanent court of international justice. The court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.”

The Council of the League of Nations lost no time in carrying out the mandate given to it by article 14 of the treaty of Versailles. At its second session in February, 1920, distinguished jurists were invited to draft a plan for a world court.

The committee met and in due course made a report to the Assembly which was finally adopted on December 13, 1920. A protocol for signature was opened on December 16, 1920, and the project for the court was approved by the Council and Assembly of the League of Nations shortly thereafter.

The Senate has at this present session given its advice

*An address delivered before the Rhode Island Citizens' Historical Society at Providence, February 11, 1926.

THE LAWYER IN EARLY TIMES

HON. WILLIAM RENWICK RIDDELL.*

An Attorney at law in most, if not all of the United States, not only conducts his client's case but also acts as Counsel on argument, trial, etc. A different rule prevails in England and in Ontario—the Attorney is silent in court and the Barrister does the speaking. This was not always the case—originally, as Blackstone points out, 2 *Commentaries*, 25, every suitor was obliged to appear in person, unless by royal license. This license, which in strictness should be by letters-patent, came to be granted as of course by the Justices in the Curia Regis or in Eyre—like every other license this involved a fee payable to the King, a considerable part of whose revenue was derived from his courts. The *Curia Regis Rolls of the Reigns of Richard I and John* recently published by the King's Printer, containing records from 1196 to 1203, have many entries of the appointment of attorneys in court and of actions conducted for plaintiff or defendant by attorneys. At this time the usual practice was for the client to appear in court and openly make the appointment; e. g. in Hilary Term, 1 John (1200) we have an entry: "*Bed'*—*Emma uxor Ricardi de Argentem ponit loco suo virum suum versus Henricum de Sarnebroc de placito assise ad lucrandum vel perdendum*"—"Bedford: Emma, wife of Richard of Argentem puts in her place her husband against Henry of Sharnbrook in a plea of Assize to win or lose."

*Justice of the Appellate Division of the Supreme Court of Ontario

THE BRIEF

Sometimes more than one attorney is named—e.g., in the immediately preceding entry, Peter Corbecun puts in his place the Prior of Stollée (i.e. Studley) or Simon of Cotton or Richard of Antioch. Sometimes instead of coming into court, the client came before the king himself and made the appointment either for a particular suit or as general attorney. In Hilary Term, 10 Richard I (1199), we find: "*Sussex*"—*G. filius Petri mandavit justiciariis quod abbas Sagieni posuit coram domino rege ultra mare Willelmum priorem de Arundell' ad lucrandum vel perdendum versus Brianum filium Radulfi . . . et de omnibus placitis . . . et querelis que habet in curia domini regis*" "*Sussex*—Geoffrey Fitzpeter (the Chief Justiciar) directs the Justices that the Abbott of Seez before our Lord the King beyond the sea placed William, Prior of Arundel to win or lose against Brian son of Ralph and in all pleas and complaints which he has in the Court of our Lord the King."

If the client was sick (*de malo lecti*) and sent an attorney, generally four knights (*milites*) were sent to enquire whether the sick man really approved of the attorney—the same thing was sometimes done in the case of a blind litigant. The Attorney (*attornatus, atturnatus, atornatus*) had the right to represent the client fully both in pleading and otherwise—and he was not as yet a professional man.

It was not until (1236) 21 Henry III, c. 10, that the absolute right was given to every suitor in the County Court, Trything, Hundred, Wapentake and Baronial Courts to appoint an attorney in all suits (another Act in the same sense was 1417, 5 Henry V). Attorneys in such Courts are mentioned in a statute against Maintenance (1275), 3 Edward 1 (Westminster the First) c. 33; and in pleas of Trespass in (1278) 6 Edward I (Statute of Gloucester), c. 8. In 1285 by the Statute of Westminster the Second (not the Third, as Blackstone has it: *Commentaries*, 3, 26), the king of his special grace granted to every suitor in any of his Courts,

THE LAWYER IN EARLY TIMES

in any County Court or Court Baron to appoint attorney—*“quidem attornatus vel attornati habeant potestatem in placitis . . . quousque placitum terminetur vel dominus suus ipsum amoverit”*—“which attorney or attorneys shall have authority in the pleas . . . until the plea is determined or his master (client) removes him.” (This is the origin of our rule that the retainer of a solicitor is exhausted on judgment entered, and without further instructions he has no right to take subsequent proceedings, e. g. to issue execution, etc.)

By this time the profession of attorney was becoming established—they became too numerous, indeed, for we find in 1402, the Statute of 4 Henry IV, c. 18 in the following terms: Reciting “. . . *pur pleusours damages & meschiefs gont advenuz devaunt ces heures as diverses gentz du Roialme par la grant nombre des attornees nient sachantz, naprises de la loye come ils soloient estre pardevant*”—“by reason of sundry damages and mischiefs heretofore to divers persons of the Realm by the great number of attorneys, knowing nothing nor seized of the law as they were wont to be,” the statute then enacts that all the attorneys be examined by the justices and “*leurs nouns mys en rolle & ceux qi sont bons & virtuouses & de bone fame soient receux & jurrez de bien & loialment servir en leur offices & en especial qils ne facent nulle suyte en foreine countee & soient les autres attornees oustez par la discretion des ditz Justices & qe leur meistres ove queux ils feurent attornees soient garniz de prendre autres en leur lieux parensi qen le mesne temps damage ne prejudice adviegne a leur ditz meistrez*”—“their names placed in a Roll and let those who are good and virtuous and of good repute be received and sworn well and truly to serve in their offices and especially that they will bring no suit outside their county—and let the other attorneys be ousted at the discretion of the said Justices—and let their masters (clients) for whom they are attorneys be warned to take others in their stead lest in the

THE BRIEF

meantime damage or prejudice may accrue to their said masters." This is the origin of our Attorneys' Roll, requirement of good moral character, and oath of office.

It is thought by some that notwithstanding the statute, occasionally—it is hoped, very seldom—some have got *leurs nouns en rolle* whose right to be considered *bons & virtuouses & de bone fame* was at least doubtful. But there is the Statute and Parliament had as much reason to believe it would be obeyed as Congress had in the case of the Volstead Act or the legislature of Ontario in the case of the O. T. A. However that may be, only those who are good and virtuous and of good repute have any right on the Roll and have not had for five hundred years and more.

A few years later by the Act of (1405) 7 Henry IV, c. 13, those who claimed that they had been erroneously outlawed were allowed to make an attorney instead of appearing in person in the King's Bench for relief, if they were too sick to appear.

Long before this time and indeed before attorneys became a profession, but at what precise time is uncertain, a class of men had sprung up who conducted oral proceedings. They "counted" (whence our "recounted") their client's side of the case and were consequently Counters: They were servants to the law, *servientes ad legem* and were consequently Sergeants: They discussed pleas and were consequently Pleaders—and were our Barristers.

They were not overlooked in the statutes: The Statute of Westminster the First (1275) 3 Edward I by c. 29, enacts that if any sergeant, pleader or other do any manner of deceit or collusion in the King's Court or consent "*de faire la en deceite de la Court & pur enginer la Court ou la partie*"—to do that in deceit of the court and to beguile the Court or the party—and is convicted thereof, he is to be imprisoned a year and a day and not thereafter to be heard to plead in court for anyone. Sometimes it seems to me Counsel in our own courts are perilously near incurring the

THE LAWYER IN EARLY TIMES

penalty of this statute in their attempt to engineer (engineer) His Majesty's Judges—*ergo, cavete, O fratres in Phi Delta Phi!*

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THE MASONIC SUN



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The clock of life is wound but once,
And no man has the power
To tell just when the hand will stop
At late or early hour.

Now is the only time you own;
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Place no faith in to-morrow, for
The clock may then be still.

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and responded to by R. Ex. Comp. Cowie.

Ex. Comp. A. H. Hugill proposed a toast to the departed and absent Companions.

The toast to the visitors was proposed by Comp. E. M. Shaw and responded to by Ex. Comps. Black, Royce and Charlton, Past High Priests of Sault, Michigan, Chapter, who were over along with about 40 other Companions of that Chapter. Ex. Comp. Black was present when the Chapter was constituted. The toasts were interspersed with musical and vocal selections.

"UNIVERSITY" CHAPTER, TORONTO

The November regular meeting of "University" Chapter, No. 241, G.R.C., Toronto, was "Annual Inspection Night," when the Supreme Degree of the Holy Royal Arch was conferred upon a class of candidates by Ex. Comp. C. R. Redfern, the First Principal, assisted by his Chapter officers; for the approval of R. Ex. Comp. W. H. Roberts, Grand Superintendent of Toronto District, No. 8. The latter was accompanied by District Secretary Ex. Comp. Walter H. Hoare; R. Ex. Comps. W. J. Tow, G.S.N.; and Alex. Horwood, P.G.S., all of whom received a cordial welcome from the First Principal.

The specially invited guests were the First Principals, Officers and Companions of the Beaches, Orient and Shekinah Chapters, which accounted for the unusual large number of Companions who were present.

An interesting feature was that one of the newly exalted Companions was a blood brother of the First Principal of University Chapter.

Upon the completion of the degree, R. Ex. Comp. Roberts expressed his complete approval of the manner in which each officer had done his work and congratulated the First Principal. He also stated how pleased he was to see Comp. Dr. Chas. F. Heebner, the Principal Sojourner of the Chapter, back again in office, fully recovered from his recent severe injuries which were received in an unfortunate motor accident.

THE SHEKEL AND PENNY

By Henry T. Smith, G.S.E.

Royal Arch Masons will be interested in a brief description of the Shekel and the Penny used to-day among Mark Master Mastons, especially in Canada and the United States.

It is said, that the value of a Mark is a Jewish half shekel of silver, or twenty-five cents in the currency of this country.

Mackey says:—The Shekel of silver was a weight of great antiquity among the Jews, its value being a half a dollar. In the time of Solomon, as well as long before and after, until the Babylonish exile, the Hebrews had no regularly stamped money, but generally used in traffic a currency which consisted of uncoined shekels, which they weighed out to one another.



Silver Shekel of SIMON MACCABÆUS.

(Reproduced from the Oxford Bible Concordance for Masonic Use.—
Published 1925.)

'The earliest specimens of the coined Shekel of which we know, are the

coinage of Simon Maccabæus, (value some authorities say, about 60c.), was issued about year 144 B.C. Of these we generally find on the Obverse side, a Chalice or Cup, or the Sacred Pot of Manna, with the inscription in early Hebrew letters, (or Samaritan characters)—“Shekel of Israel,” and above the cup the letters “Year 3.” On the Reverse side, the Triple Lily, or Aaron’s rod, with the inscription, “Ierusalem Kadoshah,” or “Jersulam the Holy.” The Bible authorities agree upon these inscriptions of the Shekel.

To a Mark Master Mason the Penny is a symbol of reward for faithful service, and is referred to in several passages of the Authorized Version of the New Testament, and the Penny in these passages is intended as the equivalent of the Roman Denarius, at first a silver coin, later a small copper coin used by the Romans.

St. Matthews Chapter 20. vs. 8-12. sets forth, as it will be seen, an illuminating account of the labourer and his hire:—

“So when even was come, the lord of the vineyard saith unto his steward, Call the labourers, and give them their hire, beginning from the last unto the first.”

“And when they came that were hired about the eleventh hour, they received every man a penny.”

“But when the first came, they supposed that they should have received more; and they likewise received every man a penny.”

“And when they had received it, they murmured against the good man of the house, saying, these last have wrought but one hour, and thou hast made them equal unto us, which have borne the burden and heat of the day.”



THE TRAGEDY OF AN OLD MASONIC INITIATION

By the Honourable William Renwick
Riddell, LL.D., F.R.H.S., etc.

In pursuing a legal enquiry not germane to the subject of this paper, I found an official account of disastrous consequences of a Masonic Initiation, nearly two centuries ago, which it seemed to me would be of interest to the Craft. It took place in Pennsylvania in 1737-8.

As is well-known to those interested in the history of Freemasonry, the Mystery was not

in England systematised or subjected to any central or “Grand” authority until the formation of the Premier Grand Lodge in 1717. Masonry, whenever introduced into England, whether under Aethelstane or Edwin or before or since—all of which lies in the realm of myth and conjecture—was in the hands of separate Lodges, each a law unto itself and with its own ceremonies. There never was a more daring—I had almost said, impudent—act than the assertion by any body of men calling themselves by any name, Grand

Lodge or any other, of an authority over the separate Lodges, and branding as irregular all who did not submit to their sway. The attempt was at the time measurably, and after some decades wholly, successful: but many Lodges long asserted their immemorial rights to govern themselves in their own way, to make Masons in their own way, to have such rites and ceremonies as they pleased. Not only did discrete Lodges insist upon this right but individual Masons asserted and exercised it. In "Simcoe as a Freemason," the last chapter of my *Life of John Graves Simcoe*, reprinted in *The Masonic Sun* of November, 1925, I have given an instance of the assertion of this right by individual Masons as late as 1775.

Indeed, I, for one, am not prepared to hold as no Mason, one who may have been initiated by those who have no legal Warrant for the purpose. To take an example, suppose a ship wrecked on a desert isle: one or more Freemasons in the crew initiate the others and form a Lodge: no doubt, the initiated are not regular, they must be "healed" to become regular—but I would not deny them the name of Mason.

To take an illustration from the ecclesiastical field, such an initiation would in my view parallel lay baptism—valid in case of necessity but irregular and to be followed when possible by regular but Conditional Baptism.

In Pennsylvania, it is known that a Masonic Lodge met as early as 1731 at Philadelphia, wholly independent of the Grand Lodge of England, that it did not recognize the authority of the Grand Lodge of England till the fourth decade of the Eighteenth Century, and that it itself became a Grand Lodge.

It was apparently in this Lodge that the tragedy took place, of which I am now to speak; and it will be observed that part of the ceremony of Initiation was a piece of horse-play which had no part in the English Ritual. Horse-play was once common, giving rise to the supposition of "riding the goat," etc.,—certain oral horse-play is not uncommon even now in certain "higher degrees," to the exasperation but not the physical harm of the neophyte.

In the Pennsylvania Lodge, Daniel Rees was to be initiated into Freemasonry. Dr. Evan Jones was Master of the Lodge, and John Remington, a lawyer, one of the members; part of the ceremony consisted in a sport called Snap Dragon, in which burning spirit was used to make a sudden and violent blaze. Through some accident or mismanagement, Dr. Jones allowed some of the blazing fluid to fall on the breast of the candidate: this burned him so severely that he died in a few days.

Dr. Jones was arrested and tried for murder: he was properly convicted of manslaughter: the lawyer, John Remington, though he had no hand in throwing or spilling the liquor on Rees, was convicted of aiding and abetting Jones and sentenced to be burnt in the hand.

These facts appear from the Petition of John Remington, presented to the Council held at Philadelphia, February 3rd, 1738, presided over by the "Honourable James Logan, Esqr., President," and attended by seven Councillors—the record is printed in Volume IV. of the *Minutes of the Provincial Council of Pennsylvania* . . . published by the State, Harrisburg, 1851, pp. 274-277. This series is not

infrequently quoted as *Colonial Records, Pennsylvania*.

The unhappy "John Remington, Attorney-at-law," in this Petition, said that he "was unfortunately deluded and drawn into the idle Diversion of performing the Ceremony of making a free Mason in Order to which a Sport called Snap Dragon was prepared, at which the Petitioner was persuaded to be present." (He does not say who deluded, drew or persuaded him: but it was, of course, "the other fellow"). Then, "unhappily, some of the burning Spirit used in this Sport was thrown or spilt on the breast of one Daniel Rees which so burnt or scalded him that in a few days after, the said Daniel died." Apparently the candidate was lying down.

After telling of the conviction of Dr. Jones as "Principle," and himself as accessory, he says that the sentence against him, "if put into execution would tend to the utter ruin of the petitioner, his wife and two small children"; and he humbly prays "that the President and Council would be pleased to grant him a Pardon."

He was pardoned his crime and relieved of "the burning in the hand which by reason thereof he ought to suffer." But it seems very clear that so far from being the deluded, misled and innocent victim of some designing brother in the Lodge, Remington was an active mover in the revels. The Record proceeds, "But it being observed that in the course of the trial a certain wicked and irreligious paper had been produced and read, which appeared to be composed by the said Remington, who had made the said Daniel Rees repeat the same as part of the form to be gone through on initiating him as a free Mason: the Board therefore agreed that the

Pardon should be so restricted as that it might not be pleaded in Bar of any Prosecution that should hereafter be commenced against the said Remington on account of the said scandalous paper."

This probably was held *in terrorem* over and would hold for a while, the said John Remington; but the very fact of such a privately-written paper forming part of the ceremony of Initiation proves that the Lodge was discrete, independent and sole judge of its own ceremonies.

What became of the unfortunate Dr. Jones does not appear; he apparently "took his medicine," too strong for the lawyer.

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Osgoode Hall, Toronto,

Thanksgiving Day,

November 8, 1926.

The Tragedy of an Old Masonic Initiation

By the Honourable William Renwick
Riddell, LL.D., F.R.H.S., etc.

In pursuing a legal enquiry not germane to the subject of this paper, I found an official account of disastrous consequences of a Masonic Initiation, nearly two centuries ago, which it seemed to me would be of interest to the Craft. It took place in Pennsylvania in 1737-8.

As is well-known to those interested in the history of Freemasonry, the Mystery was not in England systematised or subjected to any central or "Grand" authority until the formation of the Premier Grand Lodge in 1717. Masonry, whenever introduced into England, whether under Aethelstane or Edwin or before or since—all of which lies in the realm of myth and conjecture—was in the hands of separate Lodges, each a law unto itself and with its own ceremonies. There never was a more daring—I had almost said, impudent—act than the assertion by any body of men calling themselves by any name, Grand

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After telling of the conviction of Dr. Jones as "Principle," and himself as accessory, he says that the sentence against him, "if put into execution would tend to the utter ruin of the petitioner, his wife and two small children"; and he humbly prays "that the President and Council would be pleased to grant him a Pardon."

He was pardoned his crime and relieved of "the burning in the hand which by reason thereof he ought to suffer." But it seems very clear that so far from being the deluded, misled and innocent victim of some designing brother in the Lodge, Remington was an active mover in the revels. The Record proceeds, "But it being observed that in the course of the trial a certain wicked and irreligious paper had been produced and read, which appeared to be composed by the said Remington, who had made the said Daniel Rees repeat the same as part of the form to be gone through on initiating him as a free Mason: the Board therefore agreed that the

Lodge or any other, of an authority over the separate Lodges, and branding as irregular all who did not submit to their sway. The attempt was at the time measurably, and after some decades wholly, successful: but many Lodges long asserted their immemorial rights to govern themselves in their own way, to make Masons in their own way, to have such rites and ceremonies as they pleased. Not only did discrete Lodges insist upon this right but individual Masons asserted and exercised it. In "Simcoe as a Freemason," the last chapter of my *Life of John Graves Simcoe*, reprinted in *The Masonic Sun* of November, 1925, I have given an instance of the assertion of this right by individual Masons as late as 1775.

Indeed, I, for one, am not prepared to hold as no Mason, one who may have been initiated by those who have no legal Warrant for the purpose. To take an example, suppose a ship wrecked on a desert isle: one or more Freemasons in the crew initiate the others and form a Lodge: no doubt, the initiated are not regular, they must be "healed" to become regular—but I would not deny them the name of Mason.

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To take an illustration from the ecclesiastical field, such an initiation would in my view parallel lay baptism—valid in case of necessity but irregular and to be followed when possible by regular but Conditional Baptism.

In Pennsylvania, it is known that a Masonic Lodge met as early as 1731 at Philadelphia, wholly independent of the Grand Lodge of England, that it did not recognize the authority of the Grand Lodge of England till the fourth decade of the Eighteenth Century, and that it itself became a Grand Lodge.

It was apparently in this Lodge that the tragedy took place, of which I am now to speak; and it will be observed that part of the ceremony of Initiation was a piece of horse-play which had no part in the English Ritual. Horse-play was once common, giving rise to the supposition of "riding the goat," etc.,—certain oral horse-play is not uncommon even now in certain "higher degrees," to the exasperation but not the physical harm of the neophyte.

In the Pennsylvania Lodge, Daniel Rees was to be initiated into Freemasonry. Dr. Evan Jones was Master of the Lodge, and John Remington, a

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lawyer, one of the members; part of the ceremony consisted in a sport called Snap Dragon, in which burning spirit was used to make a sudden and violent blaze. Through some accident or mismanagement, Dr. Jones allowed some of the blazing fluid to fall on the breast of the candidate: this burned him so severely that he died in a few days.

Dr. Jones was arrested and tried for murder: he was properly convicted of manslaughter: the lawyer, John Remington, though he had no hand in throwing or spilling the liquor on Rees, was convicted of aiding and abetting Jones and sentenced to be burnt in the hand.

These facts appear from the Petition of John Remington, presented to the Council held at Philadelphia, February 3rd, 1738, presided over by the "Honourable James Logan, Esqr., President," and attended by seven Councillors—the record is printed in Volume IV. of the *Minutes of the Provincial Council of Pennsylvania* . . . published by the State, Harrisburg, 1851, pp. 274-277. This series is not infrequently quoted as *Colonial Records, Pennsylvania*.

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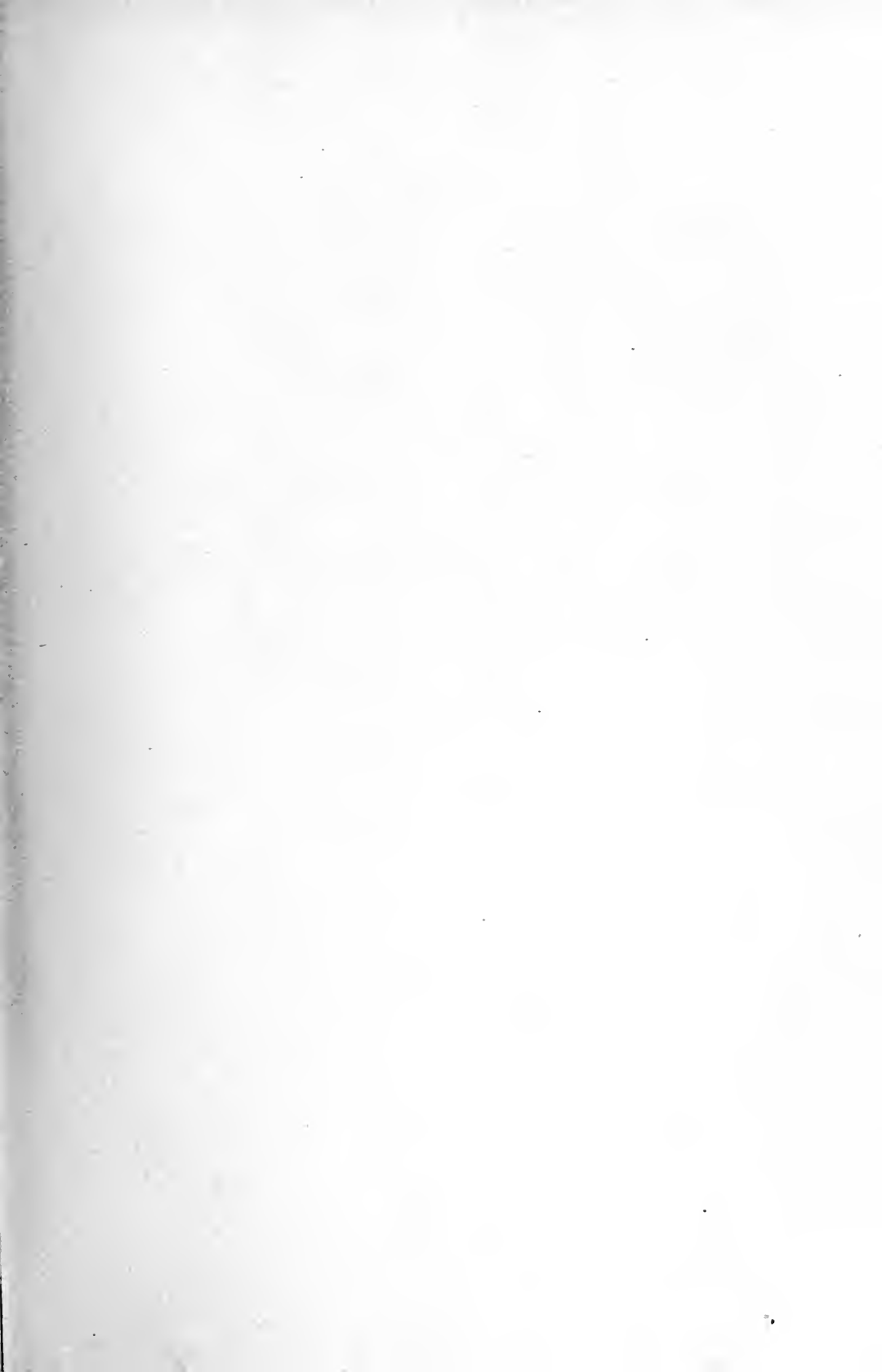
*Laying
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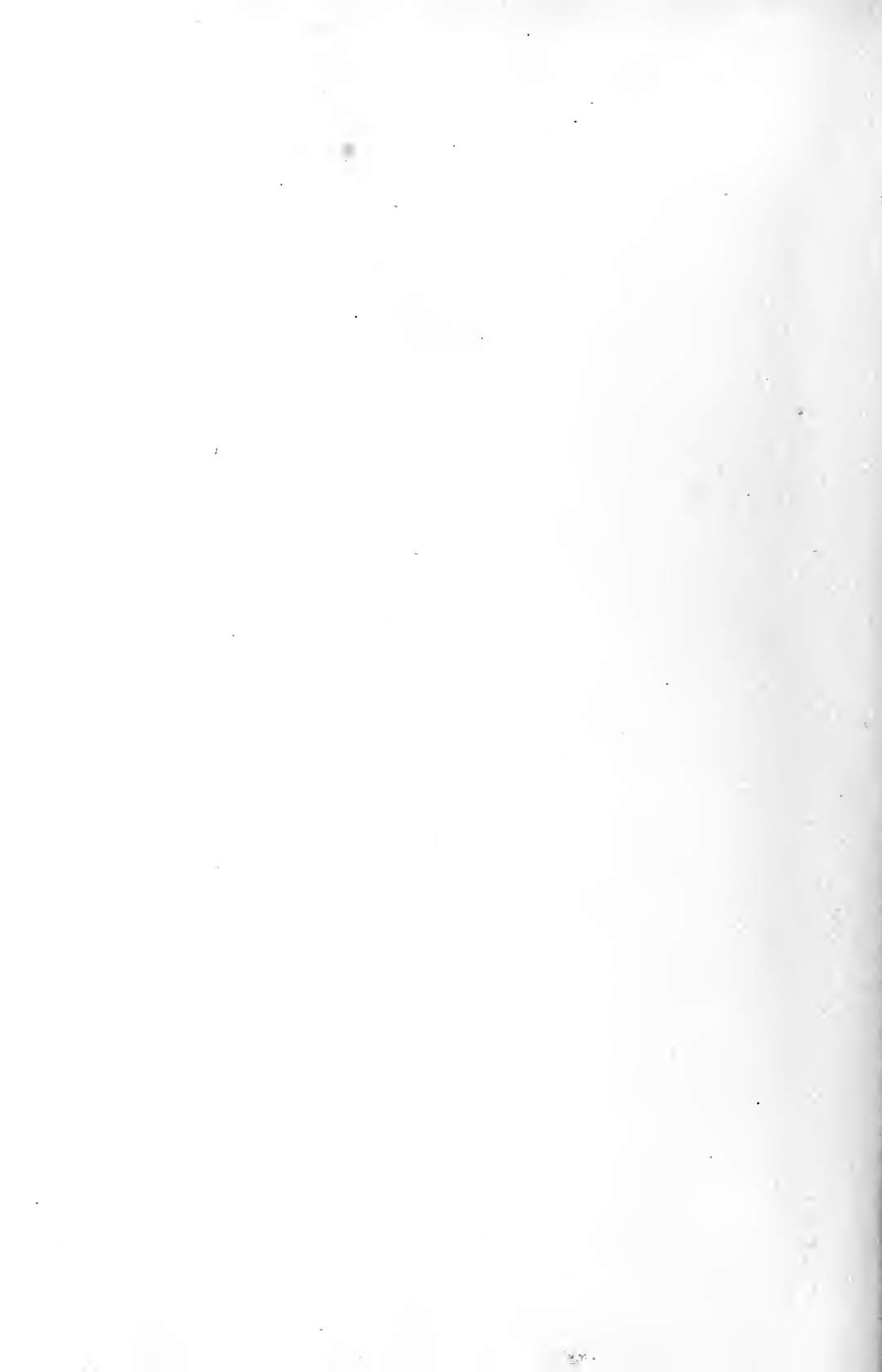
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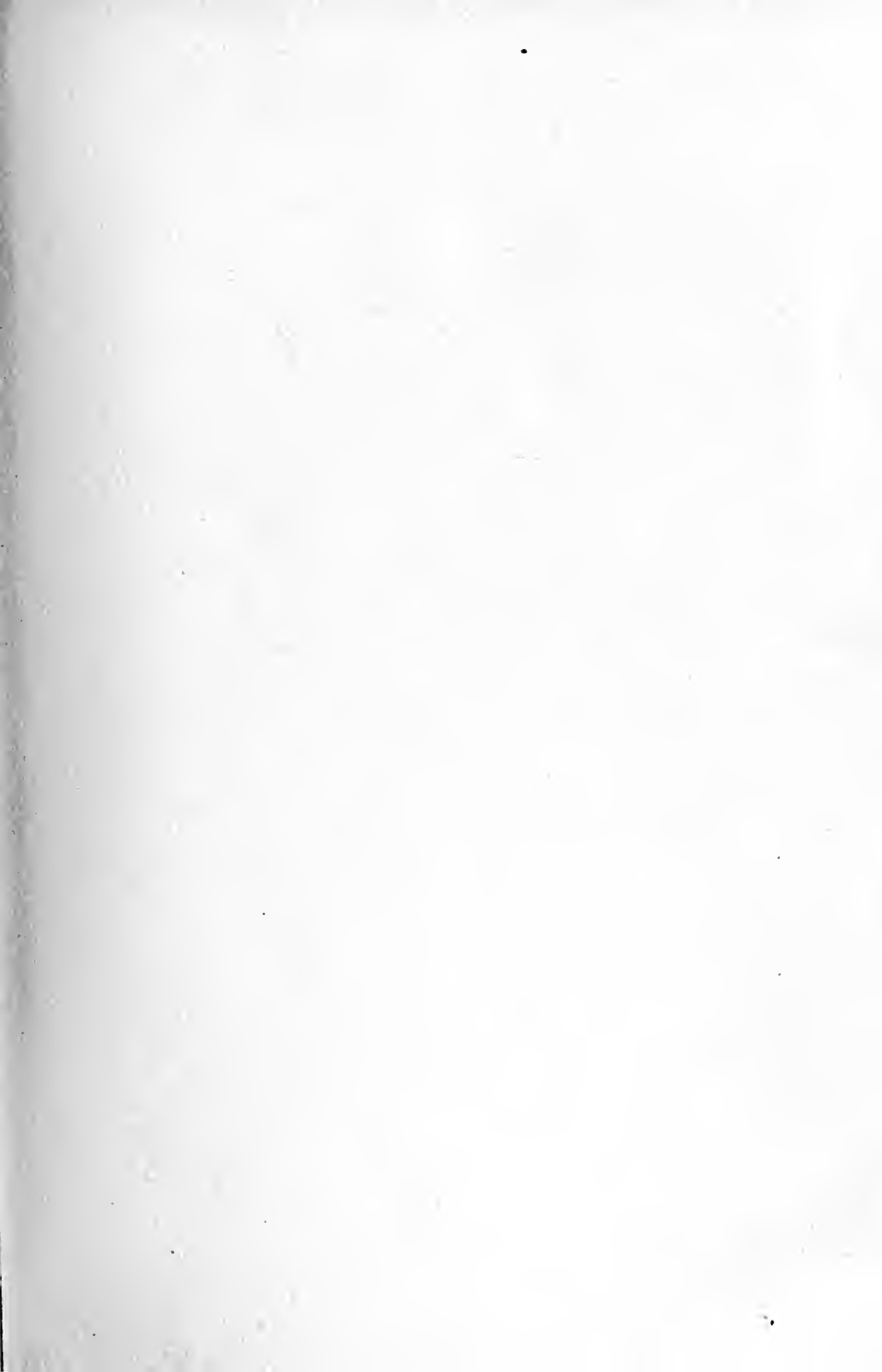
*April Twenty Fourth
Nineteen Hundred &
Twenty Six,*

*By his Honour,
Colonel Henry Cockshutt LL.D.
Lieutenant Governor
of the
Province of Ontario*











IN recording the ceremony of the laying of this stone it will be of value to the student of Canadian history to recall an interesting antecedent of the event.

On a Saturday morning, the twenty-fourth of April, one hundred and two years ago, Major General Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, in the presence of a notable company, laid the corner stone of the Court House of the Town of York.

On the site of the Court House and its appurtenances—the gaol and the public stocks—Imperial Oil, Limited, planned to erect a business building. An invitation was extended to the Canadian Historical Association to re-enact the historical event of over one hundred years ago and upon the acceptance of this invitation there followed the ceremony herein outlined.

Thus in these pages is described the laying of the first stone on Saturday, April 24, 1824, and the laying of the present stone on the corresponding Saturday, April 24, 1926.



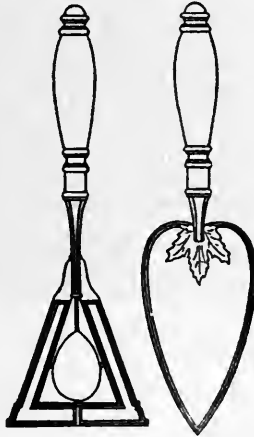
Court House of the Town of York 1824 —Harold H. Pearl

INSCRIPTION ON THE STONE.

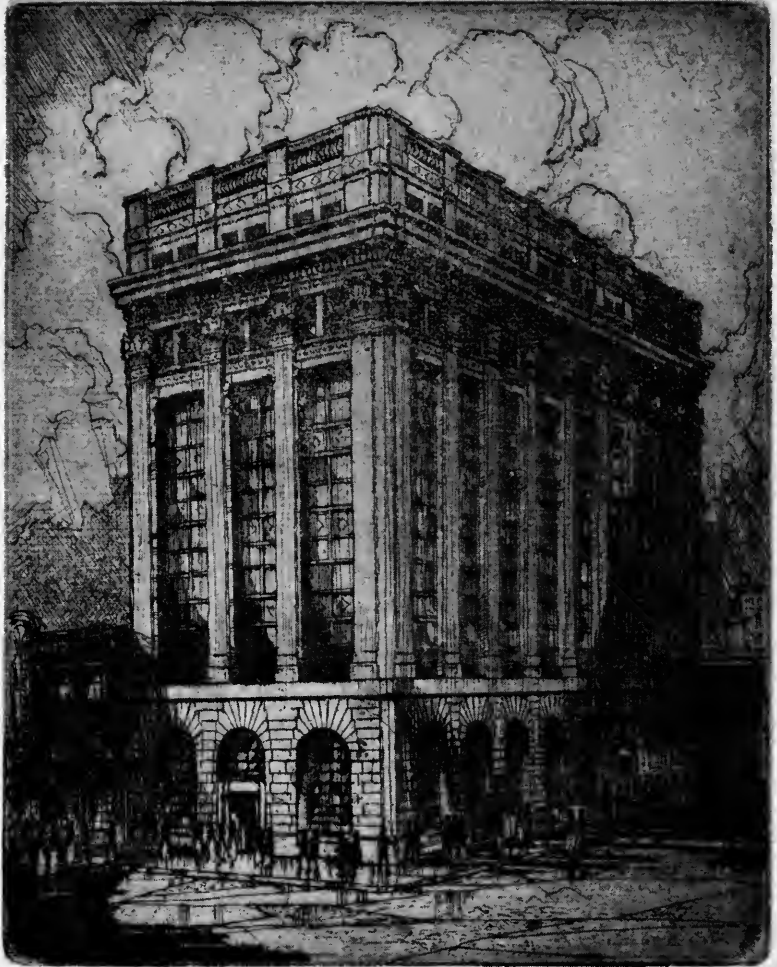
HERE IN COURT HOUSE SQUARE STOOD THE COURT HOUSE OF THE TOWN OF YORK, THE CORNER STONE OF WHICH WAS LAID ON THE TWENTY-FOURTH OF APRIL, MDCCCXXIV, BY MAJOR-GENERAL SIR PEREGRINE MAITLAND, K.C.B., LIEUTENANT-GOVERNOR OF THE PROVINCE OF UPPER CANADA.

HERE WITHIN THE PRECINCTS OF THE
GAOL STOOD THE PUBLIC STOCKS.

THIS CORNER STONE WAS LAID ON THE TWENTY-FOURTH OF APRIL,
MCMXXVI, BY COLONEL HENRY COCKSHUTT, LL.D.,
LIEUTENANT-GOVERNOR OF THE PROVINCE OF ONTARIO.



*Articles of Craft, the Trowel and Plumb-bob,
with which the Stone was laid.*



Imperial Oil Limited Building, Toronto —Harold A. Pearl.

Order of Proceedings

MR. JOHN A. PEARSON, PRESIDENT OF THE ONTARIO ASSOCIATION
OF ARCHITECTS, DIRECTED THE PROCEEDINGS
WHICH OPENED AT 11.30 A.M.

ON the platform, banked by a troop of Girl Guides, were Colonel Henry Cockshutt, Lieutenant-Governor of the Province of Ontario, Mrs. Cockshutt, and Colonel Fraser, A.D.C., Mr. Charles O. Stillman, President of Imperial Oil, Limited; The Right Honourable Sir William Mulock, K.C.M.G., Chief Justice of Ontario; The Honourable Mr. Justice Riddell and Mrs. Riddell, the Honourable Mr. Justice Mowatt, Mr. John Pearson, Mr. C. N. Cochrane, M.A., Mr. A. J. S. Holton and others.

A troop of Boy Scouts lined the aisle of the new Imperial Oil, Limited, Building.

Before the commencement of the proceedings Mrs. Cockshutt and Mrs. Riddell were presented with bouquets of roses by the Captain of a company of Girl Guides who were present as a guard of honour.

John A. Pearson: Your Honour, ladies and gentlemen, Mr. Stillman, President of Imperial Oil, Limited, will give expression to the privilege accorded to the Canadian Historical Association to mark the site.

Mr. Charles O. Stillman, President of Imperial Oil, Limited, said: It is with great pleasure that I extend to the Canadian Historical Association the opportunity of marking this site. All of the officers of this company, including myself, are members of the Canadian Historical Association and it is in this dual capacity that we join in this ceremony. Upon behalf of the company that I represent, I desire to thank his Honour, Sir William Mulock, Mr. Justice Riddell and all of our other guests for their presence here to-day.

Mr. John A. Pearson: The next order of procedure, Sir William Mulock, K.C.M.G., Chief Justice of the Province of Ontario.

Sir William Mulock, K.C.M.G., said: On behalf of the Canadian Historical Association I now request his Honour the Lieutenant-Governor of the Province of Ontario, to lay the corner stone which

will mark the place of its predecessor, the corner stone laid on the occasion of the erection of the Court House on this spot over a century ago.

Mr. John A. Pearson: Mr. A. J. S. Holton, Architect of the Building, will present the trowel and plumb-bob to his Honour, after depositing in the receptacle a casket containing coins of the realm, copies of the current issues of the press; the signatures of the Mayor and Corporation of the City of Toronto; a list of the members of the Executive Council of the Province of Ontario; the signatures of the President and Directors of Imperial Oil, Limited; and the names of the Employee Shareholders of the Company; the signatures of the Architect and of the Contractors of the building; together with a record of these proceedings.

This casket is of 24-ounce copper, hermetically sealed, heavily coated with paraffin. It is completely embedded in powdered charcoal, which acts as an absorbent in case sudden changes in temperature may cause damp or moisture to leach through the masonry.

Mr. A. J. S. Holton: Your Honour, as Architect of the building, it gives me great pleasure on behalf of the officers of Imperial Oil, Limited, to present you with these articles of craft, the trowel and plumb-bob.

I can assure you that the example you set in workmanship here will be followed by my associates and by the builders in the rest of the work of the building, and that when we have finished here you will have a building that you will be as proud of as we are. I hope it will be, when finished, like the Canadian dollar to-day—command a premium.

Mr. John A. Pearson: Your Honour, may I introduce to you Mr. John Meitle, master mason, who will give you whatever assistance is necessary in the laying of the stone.

—The trowel and plumb-bob were then handed to his Honour.

Lieutenant-Governor Cockshutt: I declare this stone to be well and truly laid.

Mr. John A. Pearson: The Honourable Mr. Justice Riddell will give an account of the history of the site and what transpired some one hundred years ago on the ground that we are now occupying.

Address by Hon. Mr. Justice Riddell

HON. MR. JUSTICE RIDDELL, who was received with applause, said: Your Honours, my Lord, ladies and gentlemen. The name of this, our Queen City, is known wherever the English—I had almost said, “or any other civilized”—language is spoken.

Whatever the meaning, etymologically, of the word Toronto—and I am not going to enter into the controversy—for many years when Canada was nominally French, the name was applied, more or less indefinitely indeed, to a trading post in this vicinity. When localized, Toronto was about the present Exhibition Park—and there was the French Fort, Toronto or Rouille.

When the time was come for a change of masters, when in 1760 Montreal fell and with it French Canada, Major Rogers on his marvellous expedition to occupy Detroit and Michillimackinac for his master, sailed up the Great Lakes, he did not forget or overlook Toronto. The fur-trade was considered the only thing for which the country was useful and Canada, when Canada was constituted, had this part of it left for the fur-trade.

From characteristic consideration for the dignity, susceptibilities and feelings of the Indians, even more than from regard for their property rights, the British authorities entered into formal negotiations with the Mississagas. Deputy-Surveyor-General John Collins—whose name is familiar to most of you (laughter)—representing his Majesty, met three Indian Chiefs at Consecon or the Carrying-Place, and September 23, 1787, received a grant to His Majesty of this land including the present County of York and City of Toronto.

In 1792, came John Graves Simcoe, the first Lieutenant-Governor of the new Province. He selected Niagara, which he re-named Newark, as his Capital, and determined to found a new Capital farther from the international border on the Forks of the La Tranche—which he re-christened the Thames. That ultimately furnished him his ideal, and he never wavered in his adhesion to the choice of



Major-General Sir Peregrine Maitland

*Lieutenant-Governor of Upper Canada, who laid the
Corner Stone of the Court House of the
Town of York in April, 1824.*

his site which is now the beautiful City of London.

But a Lake Port was needed for a naval arsenal and haven for ships of war. Simcoe was, above and before all else, a soldier, and he never was free from apprehension of aggression from the south. He knew of Toronto and visited it in May, 1793; he gave it the name York, from the King's son, the Duke of York, and later on, when it became certain that Fort Niagara on the right bank of the river would soon be given up to the Americans, he recognized that Newark could no longer remain the Capital, and he selected York as the temporary Capital.

In addition and as an adjunct, he planned a Town of York. The town was not to reach to the water's edge—the strand was to be kept for public purposes, and the original Town of York did not get as far west as the spot in which you are standing.

But the Town had already begun—the celebrated La Rochefoucault-Liancourt, who visited the Province in 1795, says that houses had been built near the Don. "It is true," he says, "that the inhabitants are not of the best kind,"—but when was Toronto free from misrepresentation and calumny? And who would expect an unprejudiced opinion from the Duc's informants in Newark who saw their fair town about to be deprived of the prestige and material advantage of metropolitan status to the aggrandisement of these inhabitants of York?

By 1801 this town had a population of 336 and steadily increased until in 1819 the population was 1174. The Courts all came to York.

For a time the Courts sat in part of the Government Buildings at the eastern end of the town, at the foot of Berkeley Street, but these buildings were destroyed by the Americans in the war of 1812. Then a two-storey frame dwelling house occupied by Alexander Montgomery, facing on Richmond Street, was used as the Court House.

The first gaol in York—which may be interesting to some of you, either directly or through your ancestors (laughter)—was a log structure on the south side of King Street nearly opposite the present Toronto Street, a site afterwards occupied by the Leader Building so well known to old Torontonians. This got into a shameful state of disrepair. From 1797 this block had been designed for a gaol, as we find it marked “Gaol” in a “Plan for the Enlargement of York,” signed by David William Smith (afterwards Sir David William Smith), acting surveyor-general, and by Peter Russell, the Administrator of the Province, in Council, June, 1797.

In 1819 a Patent was issued granting to Grant Powell, D’Arcy Boulton, the younger, and the Honourable Alexander Macdonell, this block of land in the Town of York designated as Block “B,” bounded by King, Church, Newgate, as it was called then, which we now call Adelaide Street.

The erection of the buildings did not proceed immediately, but in time they came.

Land was not very valuable in York in those days. John Macdonell, the young Attorney General who met a hero’s death at Queenston Heights fighting in defense of his country, in his will gave to his fiancée, Mary Boyles Powell, her choice of £500 (\$2,000) or two acres of land on the west side of Church and between King and Wellington Streets, and consequently just op-



Colonel Henry Cockshutt, LL.D.

*Lieutenant-Governor of Ontario, who laid
the Corner Stone of the new Imperial Oil,
Limited, Building in April, 1926.*

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posite this block to the south. The girl was accounted wise when she took the money.

Nothing was lacking in the ceremony, April 24, 1824, when the foundation stone was laid for the two new buildings. "His Excellency the Lieutenant-Governor, attended by a Staff"—predecessor of my friend Colonel Fraser—"was met by the Honourable the Members of the Executive Council, the Judges of the Court of King's Bench and the Gentlemen of the Bar, with the Magistrates and principal inhabitants of York in procession. . . . A sovereign and half-sovereign of gold and several coins of silver and copper of the present reign (i.e. of George IV) together with some newspapers and other memorials of the present day were deposited in a cavity of the stone. . . ." The writer of this description deprecates the fact that the stone containing the coins was placed in the south-east instead of the north-east. He, however, may have been a Freemason who could not understand how a mere Lieutenant-Governor like Sir Peregrine Maitland could have been selected to officiate when there was a Most Worthy Grand Master of the Freemasons at hand.

We may not have to-day in evidence so much ceremony as there was a century and two years ago, but we have a grander arena. Then a muddy brook crossed in front of the proposed buildings—the Cathedral Church across the way was not, indeed, the original building erected in 1803-7. That little frame building had been enlarged in 1818, but it was not to be pulled down and to be replaced by a stone building until 1831.

The Gaol and Court House were both set back 79 feet from the line of King Street and left a space in front of each building. The Court House was placed in the south-east corner—just north of us—and the Gaol in the south-west, leaving a space of about 150 feet between them. At the rear ran a lane 40 feet wide, now Court Street, from Church to Toronto Street. The buildings had their gables toward King Street and had entrances at the south end, but the entrances from Church and Toronto Streets were most used, both buildings being about 40 feet in from the street line. I quote

from Dr. Scadding's "*Toronto of Old*", pp. 100, 101, the following description: "The material was red brick, pilasters of cut stone ran up the principal fronts and up the exposed or outer sides of each edifice. At these sides, as also on the inner and unornamented sides, were lesser gables, but marked by the portion of the wall that rose in front of them, not to a point but finishing square in two diminishing stages, and sustaining chimneys. It was intended originally that lanterns should have surmounted and given additional elevation to both buildings, but these were discarded together with tin as the material for the roofing with a view to cutting down the cost, and thereby enabling the builder to make the pilasters of cut stone instead of 'Roman cement.' John Hayden was the contractor. The cost as reduced was to be £3,800 (\$15,200) for the two edifices." The architect was J. Young, but he was understood to have had the assistance of Dr. William Warren Baldwin.

The whole north half of the block is thus seen to have been unnecessary for the public purposes for which it was held in trust, but the space in front of and between the buildings became a park—the "Court House Square," the part in front of the gaol accommodating the Stocks (which were not always empty), and the part between the buildings was the usual place of execution—the Tyburn of our Province. It was here that in 1837 took place the execution of a girl, their anxiety to see which prevented certain rebels from meeting over Thomas Anderson's store at the north-east corner of York and Richmond Streets as they had arranged, and may have had some effect in producing the fiasco of Gallows Hill. Here, too, were hanged in 1838 Lount and Matthews, victims of their own ardour for reform and the stern determination of the soldier Lieutenant-Governor, Sir John Colborne, and the lawyer Chief Justice Sir John Beverley Robinson, to stamp out treason in arms. Before we condemn this apparent severity, let us recall that these unfortunate men, honest as they were, had contemplated the death of many men as honest as themselves, but thinking differently. But there were no more convictions for treason, arising out of the Mackenzie Rebellion—Mr. Gooderham in the Court House, immediately to the north of us, being on the Petit Jury which tried Dr. Hunter of Whitby for treason, when the jury retired, drew round him his cloak, threw

himself into his chair and said with unshakeable resolution: "Gentlemen, there are to be no more hangings"—and there were none.

There is no record of the stocks being actually used after 1834.

We have pictures of public gatherings in this Square. William Lyon Mackenzie, not yet an open Rebel, triumphantly returned by his constituents after the silly expulsion from the House, riding amid the plaudits of the crowd with the golden chain and medal presented by his people—the same ever-ardent man hooted and pelted by a like crowd in his hours of York unpopularity—election crowd addressed by Jesse Ketchum from a farmer's wagon convulsed when the moveable rostrum was seized and rushed down King Street, the earnest orator not staying his rhetoric as he maintained his equilibrium only with great difficulty. David Willson with his simple preaching and his white-robed sweet singers, Children of Peace, from Sharon on their weekly mission to the Children of Babylon, the Children of this World and it was to be feared of its Master. The myriad pranks and whimsies of a people, intelligent, quick-witted, full-blooded, not too reverent or too regardful of authority, although the stocks were constantly, the gallows occasionally, in evidence.

The northern half of the block, as we have seen, was not needed for Gaol and Court House, the express objects of the trust; but part of it was employed for a public purpose. On the north-west corner of Church and Court Streets was, in 1826, erected the first Fire Hall in the Town.

There was still much vacant land in the Block unnecessary for any public purpose, and in 1830, the Presbyterians began to build the original St. Andrew's church on the north-east corner of the block on Church and Adelaide Streets, which was continued to be used until 1876, when the St. Andrew's on King Street was opened. The old church was demolished in 1877.

On the north-west corner of this block, the Wesleyan Methodists in 1832-3, erected the second church of that denomination, the first having been opened in 1818 on the west corner of King and Jordan Streets, the site of the present Canadian Bank of Commerce. The

church on our block continued to be used until 1870 when the Metropolitan Church was opened, and its site became occupied for offices.

This block was first surveyed in 1837 and the land was sold and afterwards built upon. Where we stand now, from here to Toronto Street, on the north side of King Street, was known as the "Wellington Buildings" and that is well known to all old Torontonians.

This particular corner was sold in 1838 to one William Osborne, a real estate man in this city. In 1844, William Osborne sold the corner lots to William Henry Boulton, eldest son of D'Arcy Boulton and grandson of the Judge, and himself an attorney. I am afraid the unregenerate of Toronto called him "Bill." He was a good sport, and managed Boulton's Race Course behind "The Grange." In 1851 he transferred this property to trustees for his wife, who after his death married Goldwin Smith. In 1890 her trustees conveyed the property to George W. Kiely. His executors, in 1894, transferred the property to Sir William Mackenzie for the Street Railway, and he, in 1902, to the Toronto Railway Company and now it has been transferred to Imperial Oil, Limited, who are building this magnificent structure to-day, who bid you welcome, glad to see you citizens of the City of Toronto and hope that you will take that pride in this building which you have taken in the noble, magnificent buildings in other parts of the city, and bid you and all Toronto God-speed. (Applause.)

Mr. John A. Pearson: Professor Cochrane will now briefly explain the aims and objects of the Canadian Historical Association.

Prof. C. N. Cochrane, M.A.: Your Honours, ladies and gentlemen, as many of you are no doubt aware, the Canadian Historical Association is an outgrowth of the older Landmark Association of Canada, the main object of which was to mark sites significant in the history of our country. While, in recent years, the Association has largely extended the range of its activities, it has never forgotten its original purpose.

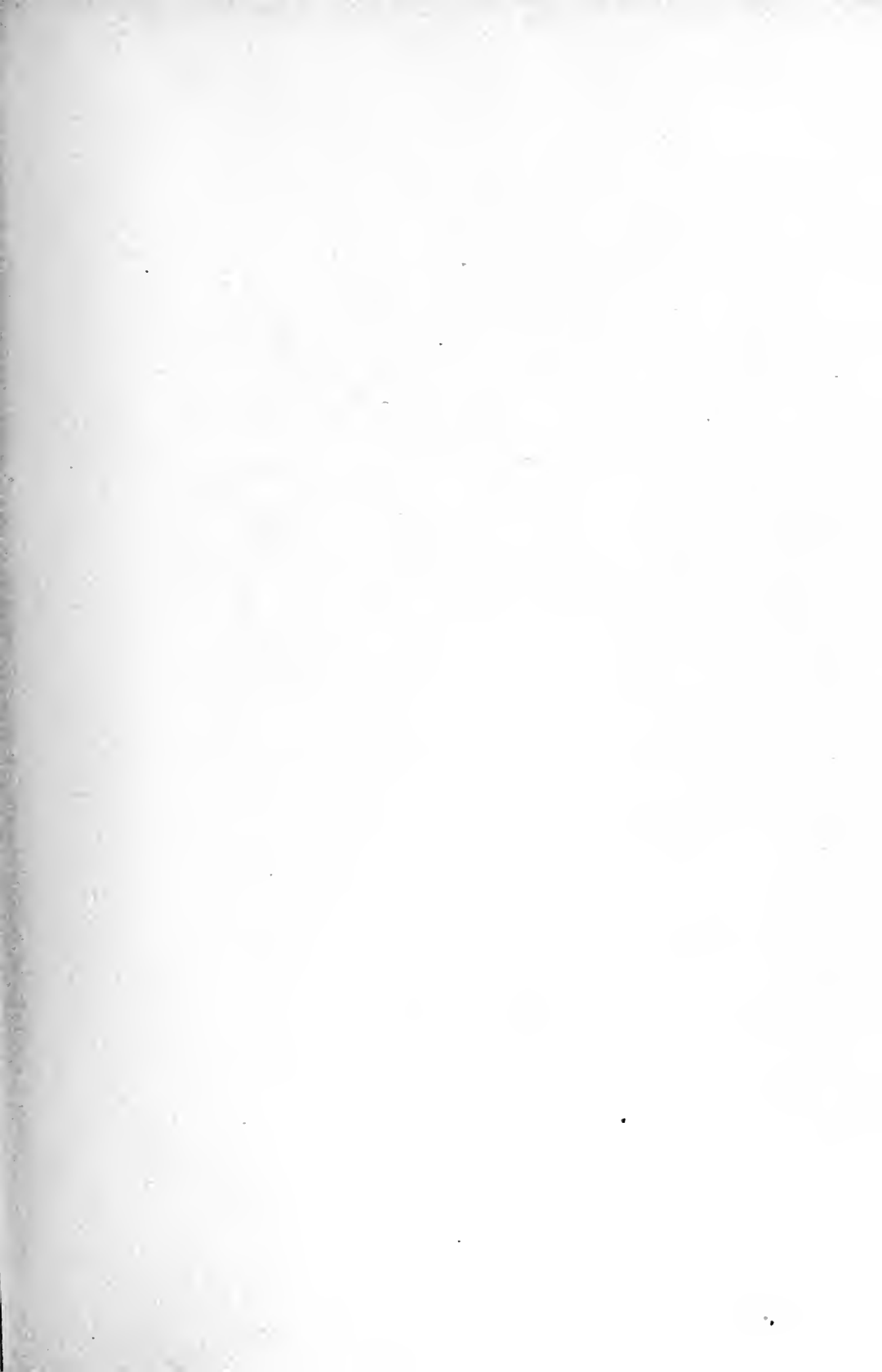
In spite of the weather and the difficulty connected with the marking of a site on such a noisy corner, I feel that you will agree

that on this occasion we have worthily maintained our purposes, and I have, therefore, on behalf of the Management Committee, to express to Mr. Charles O. Stillman, President of Imperial Oil, Limited, and the Directors of the Imperial Oil our very deep sense of gratitude to them for their courtesy and generosity in permitting us to mark this site.

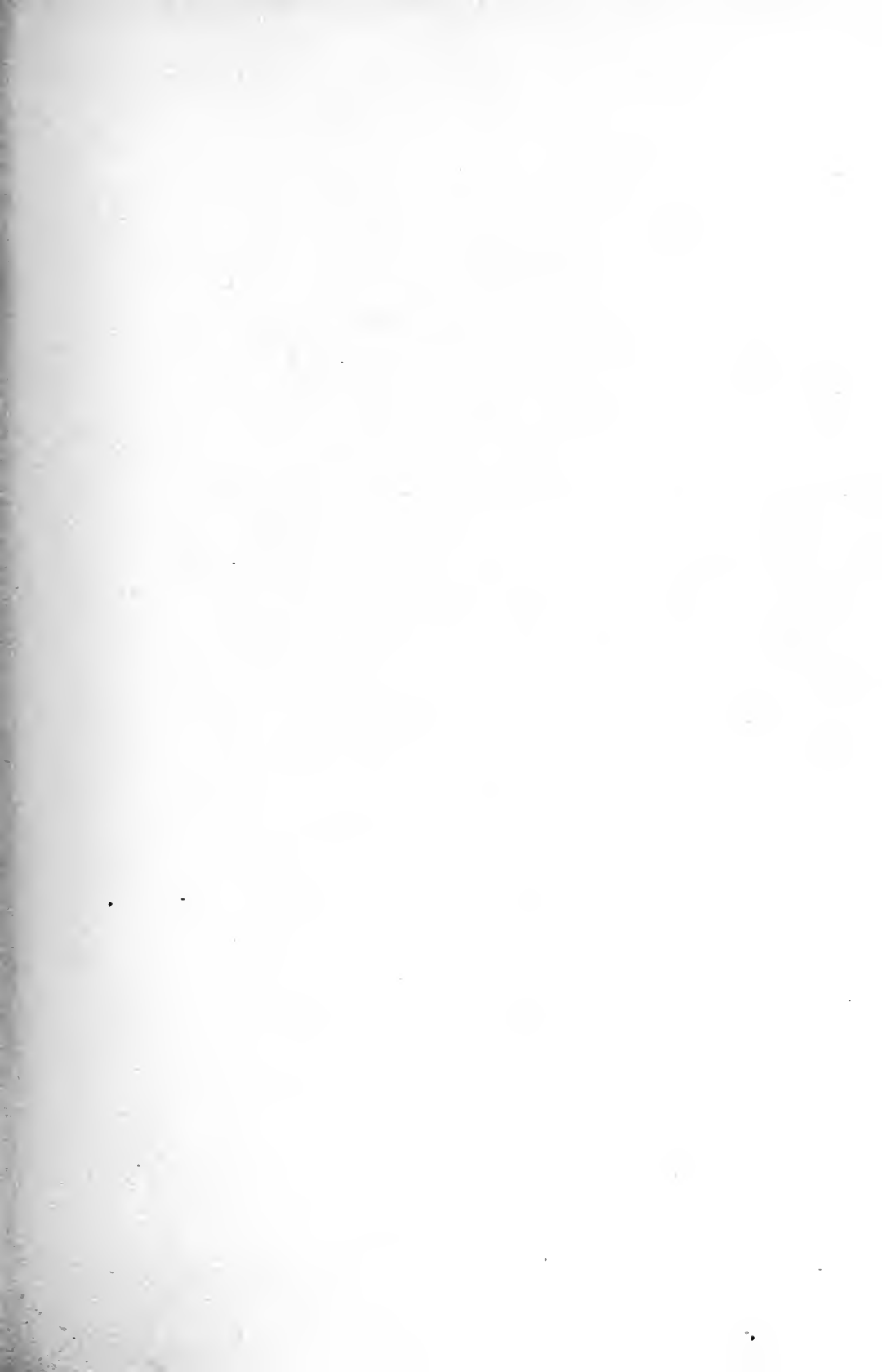
To his Honour, who has lent his presence to this occasion, as did his predecessor one hundred and two years ago, to Sir William Mulock and to Mr. Justice Riddell, who have participated in this ceremony, I thank you. (Applause.)

Mr. John A. Pearson: The meeting is adjourned, ladies and gentlemen, to lunch.











MINNESOTA LAW REVIEW

JOURNAL OF
THE STATE BAR ASSOCIATION



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An easily understood statement of the

FIRST NATIONAL BANK

Minneapolis

made pursuant to the call of the Comptroller of the Currency
at the close of business on April 12, 1926.

THE BANK HAS ON DEPOSIT:

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It has National Bank Notes in circulation - - - - -	1,688,000.00
(These are secured by Govt. Bonds deposited with the Treas. of the U. S.)	
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Interest earned but not collected - - - - -	424,193.86
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Bonds (Readily marketable for amount at which they are carried.)	6,170,630.38
Banking Houses - - - - -	1,201,166.49
Total - - -	\$102,788,274.64

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gives our depositors the strongest protection possible.

CAPITAL AND SURPLUS, \$10,500,000.00

*Combined Deposits of First National Bank, Minneapolis Trust
Company and Hennepin County Savings Bank \$113,668,259.71*

MINNESOTA LAW REVIEW

Journal of the State Bar Association

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No. 7

CRIMINAL LAW IN CANADA

BY WILLIAM RENWICK RIDDELL*

THIS article is descriptive, not polemical; it is not a missionary effort or intended to exhibit any supposed superiority of our system—every free country has the system that it really desires, and what suits us might not suit another people.

By the British North America Act of 1867 which may be considered the written Constitution of Canada, Criminal Law is assigned to the Dominion.

Before 1892, the Common Law of England as modified by statutes, some Imperial but mainly Colonial, was the Criminal Law of the Dominion—this for historical reasons was not precisely the same in all the Provinces. In 1892, a Criminal Code was passed by the Dominion Parliament, which amended, recodified and again amended, states the criminal law of all the Dominion. In the Code, there is given a definition of the various crimes, in plain language devoid of technicality and archaism. The distinction of felony and misdemeanor is abolished—we are a practical people and even our lawyers cannot see any sense of advantage in calling perjury one kind of a crime and stealing another. The crimes are rather divided according to the manner of prosecuting them. We have indictable offences and non-indictable offences.

While Criminal Law, including procedure, evidence, etc., is allotted to the Dominion, the Province is charged with its administration. In every Province there is an attorney-general, a member of the government, whose department attends to the administration of criminal justice.

*This article was prepared by Mr. Justice William Renwick Riddell, Justice of the Supreme Court of Ontario, (Appellate Division) at the request of the editor.

While every municipality, city, town or county has its own police force, most of the Provinces have their provincial police; and all these coöperate with each other. Being very familiar with the work of the police, I confidently assert that while there does occasionally arise a puzzling and apparently insoluble mystery, the cases are exceedingly few in which the authors of a crime escape detection and arrest. In criminal prosecutions we in Canada being a poor and busy people, have no time or money to waste on frills and sensation—we have adopted the view that a criminal prosecution is a solemn investigation by the state to determine whether the accused has been guilty of a crime against it, and not a game at which the smartest man wins and the newspapers get lots of interesting copy.

Leaving aside the inferior offences which are tried by justices of the peace in a summary way, let us trace the course of a prosecution for a more serious offence.

The accused being arrested (say) on a warrant is taken before a justice of the peace, evidence is taken, the accused having the right in person or by counsel to cross-examine as well as to adduce evidence—if the evidence seems to make out the offence, the accused may if he sees fit make a statement or remain silent. If no offence is proved, the accused is discharged; if the contrary, he may be committed for trial.

Pausing here to consider a very common procedure—there is a class of magistrates specially appointed called police magistrates, stipendiary magistrates, etc., (some of them being women) who have greater powers than the ordinary justice of the peace—these have power to try certain offences without the consent of the accused. If, however, the offence is of a graver character but not of the gravest, the accused on being brought before such a magistrate is informed of the charge against him and that he has the option of being tried at once by the magistrate without a jury or by the next court of competent jurisdiction with a jury. If he elects trial by jury, he is committed for trial if the evidence seems to establish the crime.

Trials without commitment in this way, we call summary trials—and the great majority of charges of crime which can be, are tried in this method.

Then we have speedy trials. Whenever anyone is committed to gaol for trial whether by a police magistrate or ordinary jus-

tice of the peace for any but certain specified offences, the sheriff must within twenty-four hours notify the county judge, giving name and charge and the county judge must with as little delay as possible (generally only a few hours) cause the prisoner to be brought before him. The judge states to the prisoner that he is charged with the offence (describing it) and that he has the option of a trial by the judge forthwith or remain in custody or under bail as the court may decide and be tried in the ordinary way by the court having jurisdiction. Suppose a speedy non-jury trial is chosen—in the ordinary case the attorney general not forbidding such a trial—in enters now if not sooner the county crown attorney. In every county there is an officer of the Crown appointed *pro vita aut causa* by the government in case of a vacancy. While naturally and of course he is a member of the political party in power at the time of his appointment, he is not a political officer, he takes no further part in politics and does not go out of office where his party is ousted. He represents "the Crown" which with us is an alias for the people; his office affords no means for political advancement, though sometimes an able county crown attorney finds it to his financial advantage to withdraw to private practice.

It is the duty of the county crown attorney in person or by his assistants to prosecute criminal cases before all courts except the Supreme Court and also to prepare cases for the Supreme Court—he attends coroners' inquests, fire inquests, etc., and generally has charge of the administration of criminal justice in his county subject, of course, where necessary, to the direction and control of his official superior, the attorney general, the minister of the Crown who with his colleagues is responsible to the Legislature and people.

The county crown attorney draws up the charge in simple form. The prisoner is arraigned—if he pleads guilty it is noted and the Judge sentences precisely as though there had been a formal trial.

The following indicates the form:

CANADA,
PROVINCE OF ONTARIO,
COUNTY OF YORK:

Be it remembered that John Smith being a prisoner in the gaol of the said County on a charge of having on the third day of January in the year 1926 at Toronto stolen one cow the property of Richard Jones and being brought before me Emerson Coats-

worth, County Judge, on the fifth day of February in the year 1926 and asked by me if he consented to be tried before me without the intervention of a jury consented to be so tried; and that the said John Smith being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said John Smith to three years imprisonment.

Witness my hand this fifth day of February in the year 1926.
(Signed) EMERSON COATSWORTH, JUDGE.

If the accused pleads not guilty the trial proceeds *instanter* or at an early convenient day; a full defence is allowed as in an ordinary trial, and a verdict given by the judge who signs a memorandum as in the form just set out with proper changes to express the fact.

A great majority of the cases brought before the county judge are disposed of by him.

If the accused elects a jury trial, he is remanded to gaol to await the sitting of the court, General Sessions or Supreme Court; moreover, the attorney general may require a trial by jury even though the prisoner elects a speedy trial.

Certain offences cannot be tried in this way, such as treason, piracy, murder, rape, defamatory libel, etc., all carefully specified in a section of the code¹.

If an accused is to be tried by a jury, he may sometimes be admitted to bail; in serious cases this is almost invariably refused. At the next court of competent jurisdiction, the accused must expect to be tried. Courts which try criminal cases with a jury are (in Ontario) either the Supreme Court in its High Court Division which has unlimited jurisdiction, or the General Sessions of the Peace presided over by the county judge which cannot try the crimes excepted by section 583.

In the General Sessions the prosecution is conducted by the county crown attorney unless the attorney general considers it proper to retain special counsel which is comparatively rare and occurs only in very important cases. In the Supreme Court, counsel selected by the attorney general for the particular sittings conducts the prosecutions. There is no glory attached to the position, the task is humdrum and consists of bringing out all the evidence which should be believed no matter how it may tell and of summing up fairly and dispassionately to the jury. No lawyer acquires a reputation by "securing" convictions or loses one by failing to do so. As I have said we look upon a criminal trial

¹Sec. 583.

as a solemn enquiry by the state; and any crown counsel who should in the heat of advocacy endeavor to bring about a conviction by an appeal to the sentiment or prejudices of the jury or by unfair comment on the evidence would earn the reprobation of his fellows if not a stern rebuke from the Judge.

The crown counsel prepares an indictment to lay before the grand jury (in Ontario of 13.) We have got away from all technicalities in indictments. The following is the usual form:

"In the Supreme Court of Ontario:

The Jurors for our Lord the King present that John Smith murdered Richard Jones at Toronto on January third, 1926."

This is laid before the grand jury with a list of the witnesses to be called—the grand jury are generally instructed that their whole duty is to see whether it seems so probable that the accused has committed the offence that the matter should be examined into in open court, and when a majority of them are satisfied that such is the case they need enquire no further but should bring in a True Bill.

No record is kept of the proceedings in the grand jury room; no investigation can be made of their proceedings but the grand jury is sworn to keep them secret.

The grand jury is at liberty to bring any matter to the attention of Court or crown counsel and the Court may permit or direct indictments accordingly but the grand jury are not allowed to pass upon any matter not submitted to them by crown counsel. After the secret enquiry in the grand jury room comes the open enquiry coram populo. Every person interested may obtain a copy of the jury panel for a few cents at a convenient time before the Court sits; a certain number of peremptory challenges is allowed, 4, 12 or 20, according to the seriousness of the crime. The number of challenges for cause is unlimited but in over forty years' experience, I have known only one instance of challenge for cause. The usual course is for counsel for the accused if there is real cause, to mention the fact to crown counsel and the juror is excused, as of course. I have never known a refusal. Very occasionally a juror himself asks to be excused and counsel agree, as of course, to excuse him.

I have never known it to take half an hour to obtain a jury. A unanimous verdict is required of the twelve petit jurors; if they cannot agree there must be a new trial. The judge has always the right and generally considers it his duty to comment upon

the evidence—but he must make it perfectly clear to the jury that they must exercise their own judgment and that they are the judges of the facts, not he; the law, indeed, they must take from him, the facts they must find themselves, no matter what he may think or say: We are fairly speedy in our criminal trials. I have had a great many, both when at the Bar and on the Bench; and have never except once seen ever a murder case take a day and a half. One case was lengthened by the great number of expert witnesses; and this led to a change in the law, limiting the number of expert witnesses to five on a side without special leave of the court.²

In case of an acquittal there is no more to be done but to discharge the accused. In case of a conviction our practice has recently undergone a profound change, the full effect of which cannot yet be estimated—it will be sufficient here to describe it.

A person convicted on indictment may appeal to the Court of Appeal (which in Ontario means either Divisional Court of the Appellate Division of the Supreme Court of Ontario and, consists of five judges) on any grounds of law, or with leave of the Court of Appeal or certificate of the trial judge that it is a fit case for appeal on any ground of fact or mixed fact and law or “with leave of the Court of Appeal on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal.”³

The Court has been very liberal in granting leave to appeal on any fairly arguable ground. An appeal may also be taken by leave of the Court by the convicted person or by the attorney general from the sentence unless that be fixed by law. More appeals succeed in respect of the sentence than in respect of conviction. The Court of Appeal has very large powers on an appeal—and it is not bound to give effect to objections however well founded. The Court is directed by the statute to allow the appeal if of the opinion that the verdict of the jury should be set aside as unreasonable or unsupported by evidence or that the judgment of the trial Court was wrong on a question of law or that on any ground there was a miscarriage of justice but “the Court may

²Rev. Stat. Can. (1906) c. 145, 3-7: “Where in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding.

³Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.”

also dismiss the appeal if notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favor of the appellant, it is also of the opinion that no substantial wrong or miscarriage of justice has actually occurred": in other words the Court is to use common sense (were it a less august body, I should use the words "horse sense") and not trouble about irregularities or even mistakes if substantial justice was done.

While only one judgment is given by the Court of Appeal, if all the judges do not concur, an appeal may be taken to the Supreme Court of Canada. This is rare but not quite unknown.

Theoretically the Judicial Committee of the Privy Council may allow an appeal from either Court, but in practice it never does.

The prerogative of mercy is vested in the central executive of Ottawa—and this seems to be now more sparingly exercised than in the past.

The result—or at least the concomitant—of our criminal law and practice may be of interest.

The Judicial Statistics Branch of the Dominion Bureau of Statistics has just published a Report on Murder, Manslaughter and Attempts to Murder, which is now available.

In the conclusions to be drawn from this report it must always be borne in mind that Canada is a comparatively new country and is blessed or cursed, favored or burdened—select your own word—with a large foreign population. This in two generations or less will be Canadianized, but for the time it runs our percentage up. Most immigrants retain the national revolver or knife but almost all, even of the next generation, forget them.

The report is for the 12-year period, 1914-1925 inclusive.

MURDER PER MILLION

Canadian born.....	11.8
Born in other British possessions.....	29.1
Born in United States.....	69.2
Born in other foreign countries.....	240.3

MANSLAUGHTER

Canadian born.....	31.5
Born in other British possessions.....	43.2
Born in United States.....	93.6
Born in other foreign countries.....	261.6

MURDER, MANSLAUGHTER AND ATTEMPTS TO MURDER

Canadian born	52.4
Born in other British possessions.....	91.1
Born in United States.....	224.6
Born in other foreign countries.....	691.9

THE EXTRATERRITORIAL POWERS OF CITIES†

BY WILLIAM ANDERSON*

GOVERNMENTAL POWERS

UP to this point we have dealt primarily with powers of a corporate or business character. We have left for discussion three powers of a distinctly governmental nature, which are in a number of cases exercised by cities beyond their boundaries. These powers—eminent domain, taxation, and police power—are not ends in themselves but rather the means by which the purposes of city government may be accomplished. Lurking in the background at all times, therefore, is the question of public purpose or public use, a question which may be especially puzzling when a city goes outside of its ordinary territorial limits to exercise its supposed authority. There is always, too, the question of the power of one place to encroach upon the local self-governing powers of a neighboring community.

EMINENT DOMAIN

The eminent domain cases give us least trouble of all. If it be once conceded that water supplies, parks, and similar facilities are for public purposes, and even for municipal purposes although located outside of city limits, then there can be little legal objection to the use of condemnation proceedings in the furtherance of the public purpose. Private interests are, after all, fully protected in matters of procedure and by the guaranty of adequate compensation, and the public interest completely outweighs all other considerations. The water supply requirements of the national metropolis are so great and urgent that few would contend that the power of eminent domain should not be used to accomplish the desired result. The magnitude of the undertaking is impressed upon us, however, when we read that, by purchase or condemnation, eleven towns have been taken over and their lands incorporated into the water impounding area.⁷⁴

The right of the legislature to authorize cities to condemn lands outside their boundaries for municipal purposes has apparently not been seriously questioned.⁷⁵ As a rule, however, the courts

†Continued from 10 MINNESOTA LAW REVIEW 497.

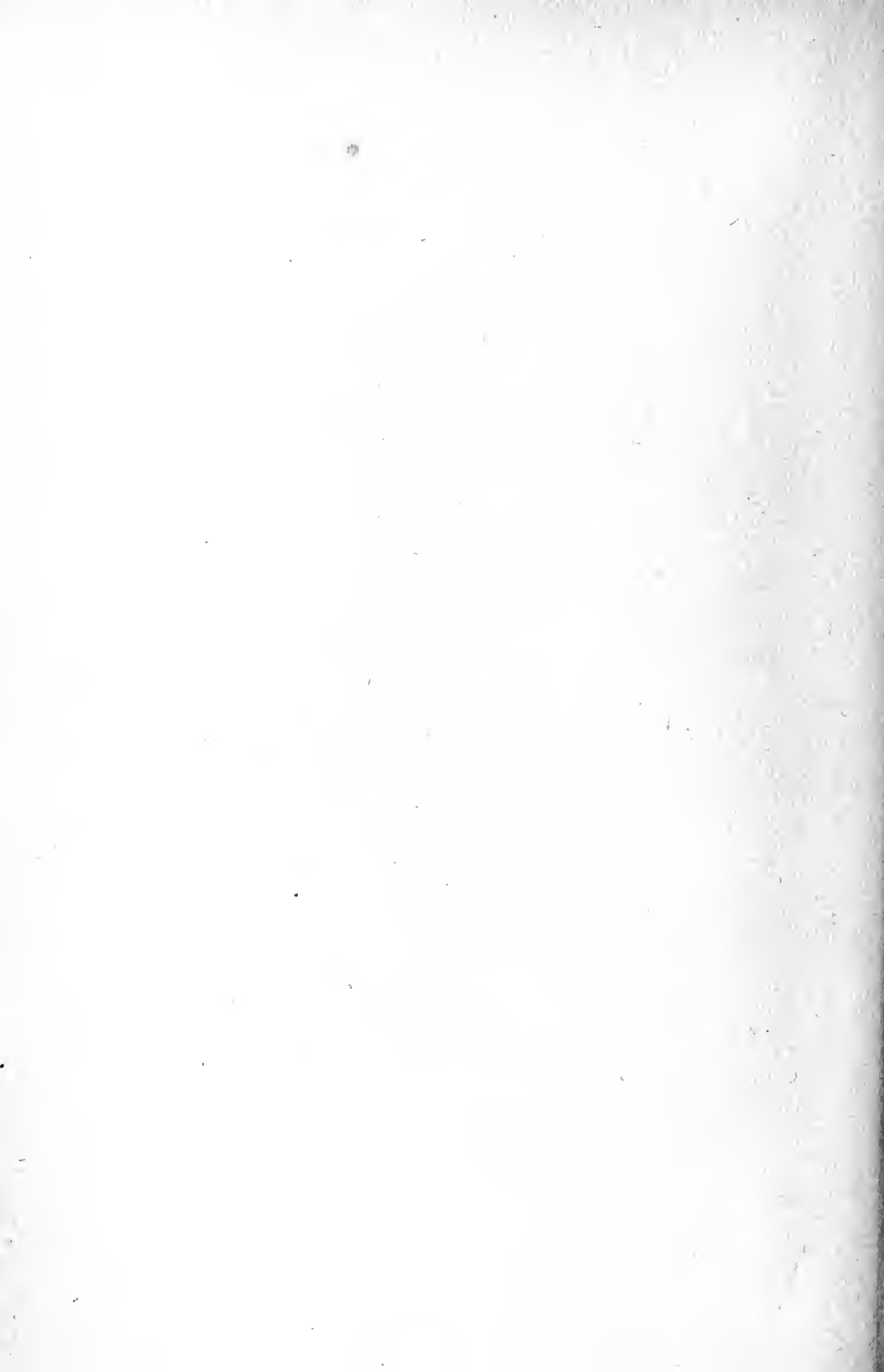
*Professor of Political Science, University of Minnesota.

⁷⁴New York Times Magazine, Sept. 13, 1925.⁷⁵Of course the usual question as to "public purpose" has arisen, and sometimes the question of "city purpose." Typical cases in which the

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By
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Justice of the Supreme Court of Ontario (App. Div.)

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Leaving aside the inferior offences which are tried by justices of the peace in a summary way, let us trace the course of a prosecution for a more serious offence.

The accused being arrested (say) on a warrant is taken before a justice of the peace, evidence is taken, the accused having the right in person or by counsel to cross-examine as well as to adduce evidence—if the evidence seems to make out the offence, the accused may if he sees fit make a statement or remain silent. If no offence is proved, the accused is discharged; if the contrary, he may be committed for trial.

Pausing here to consider a very common procedure—there is a class of magistrates specially appointed called police magistrates, stipendiary magistrates, etc., (some of them being women) who have greater powers than the ordinary justice of the peace—these have power to try certain offences without the consent of the accused. If, however, the offence is of a graver character but not of the gravest, the accused on being brought before such a magistrate is informed of the charge against him and that he has the option of being tried at once by the magistrate without a jury or by the next court of competent jurisdiction with a jury. If he elects trial by jury, he is committed for trial if the evidence seems to establish the crime.

Trials without commitment in this way, we call summary trials—and the great majority of charges of crime which can be, are tried in this method.

Then we have speedy trials. Whenever anyone is committed to gaol for trial whether by a police magistrate or ordinary jus-

tice of the peace for any but certain specified offences, the sheriff must within twenty-four hours notify the county judge, giving name and charge and the county judge must with as little delay as possible (generally only a few hours) cause the prisoner to be brought before him. The judge states to the prisoner that he is charged with the offence (describing it) and that he has the option of a trial by the judge forthwith or remain in custody or under bail as the court may decide and be tried in the ordinary way by the court having jurisdiction. Suppose a speedy non-jury trial is chosen—in the ordinary case the attorney general not forbidding such a trial—in enters now if not sooner the county crown attorney. In every county there is an officer of the Crown appointed *pro vita aut causa* by the government in case of a vacancy. While naturally and of course he is a member of the political party in power at the time of his appointment, he is not a political officer, he takes no further part in politics and does not go out of office where his party is ousted. He represents "the Crown" which with us is an alias for the people; his office affords no means for political advancement, though sometimes an able county crown attorney finds it to his financial advantage to withdraw to private practice.

It is the duty of the county crown attorney in person or by his assistants to prosecute criminal cases before all courts except the Supreme Court and also to prepare cases for the Supreme Court—he attends coroners' inquests, fire inquests, etc., and generally has charge of the administration of criminal justice in his county subject, of course, where necessary, to the direction and control of his official superior, the attorney general, the minister of the Crown who with his colleagues is responsible to the Legislature and people.

The county crown attorney draws up the charge in simple form. The prisoner is arraigned—if he pleads guilty it is noted and the Judge sentences precisely as though there had been a formal trial.

The following indicates the form:

CANADA,
PROVINCE OF ONTARIO,
COUNTY OF YORK:

Be it remembered that John Smith being a prisoner in the gaol of the said County on a charge of having on the third day of January in the year 1926 at Toronto stolen one cow the property of Richard Jones and being brought before me Emerson Coats-

worth, County Judge, on the fifth day of February in the year 1926 and asked by me if he consented to be tried before me without the intervention of a jury consented to be so tried; and that the said John Smith being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said John Smith to three years imprisonment.

Witness my hand this fifth day of February in the year 1926.
(Signed) EMERSON COATSWORTH, JUDGE.

If the accused pleads not guilty the trial proceeds instanter or at an early convenient day; a full defence is allowed as in an ordinary trial, and a verdict given by the judge who signs a memorandum as in the form just set out with proper changes to express the fact.

A great majority of the cases brought before the county judge are disposed of by him.

If the accused elects a jury trial, he is remanded to gaol to await the sitting of the court, General Sessions or Supreme Court; moreover, the attorney general may require a trial by jury even though the prisoner elects a speedy trial.

Certain offences cannot be tried in this way, such as treason, piracy, murder, rape, defamatory libel, etc., all carefully specified in a section of the code¹.

If an accused is to be tried by a jury, he may sometimes be admitted to bail; in serious cases this is almost invariably refused. At the next court of competent jurisdiction, the accused must expect to be tried. Courts which try criminal cases with a jury are (in Ontario) either the Supreme Court in its High Court Division which has unlimited jurisdiction, or the General Sessions of the Peace presided over by the county judge which cannot try the crimes excepted by section 583.

In the General Sessions the prosecution is conducted by the county crown attorney unless the attorney general considers it proper to retain special counsel which is comparatively rare and occurs only in very important cases. In the Supreme Court, counsel selected by the attorney general for the particular sittings conducts the prosecutions. There is no glory attached to the position, the task is humdrum and consists of bringing out all the evidence which should be believed no matter how it may tell and of summing up fairly and dispassionately to the jury. No lawyer acquires a reputation by "securing" convictions or loses one by failing to do so. As I have said we look upon a criminal trial

¹Sec. 583.

as a solemn enquiry by the state; and any crown counsel who should in the heat of advocacy endeavor to bring about a conviction by an appeal to the sentiment or prejudices of the jury or by unfair comment on the evidence would earn the reprobation of his fellows if not a stern rebuke from the Judge.

The crown counsel prepares an indictment to lay before the grand jury (in Ontario of 13.) We have got away from all technicalities in indictments. The following is the usual form:

"In the Supreme Court of Ontario:

The Jurors for our Lord the King present that John Smith murdered Richard Jones at Toronto on January third, 1926."

This is laid before the grand jury with a list of the witnesses to be called—the grand jury are generally instructed that their whole duty is to see whether it seems so probable that the accused has committed the offence that the matter should be examined into in open court, and when a majority of them are satisfied that such is the case they need enquire no further but should bring in a True Bill.

No record is kept of the proceedings in the grand jury room; no investigation can be made of their proceedings but the grand jury is sworn to keep them secret.

The grand jury is at liberty to bring any matter to the attention of Court or crown counsel and the Court may permit or direct indictments accordingly but the grand jury are not allowed to pass upon any matter not submitted to them by crown counsel. After the secret enquiry in the grand jury room comes the open enquiry *coram populo*. Every person interested may obtain a copy of the jury panel for a few cents at a convenient time before the Court sits; a certain number of peremptory challenges is allowed, 4, 12 or 20, according to the seriousness of the crime. The number of challenges for cause is unlimited but in over forty years' experience, I have known only one instance of challenge for cause. The usual course is for counsel for the accused if there is real cause, to mention the fact to crown counsel and the juror is excused, as of course. I have never known a refusal. Very occasionally a juror himself asks to be excused and counsel agree, as of course, to excuse him.

I have never known it to take half an hour to obtain a jury. A unanimous verdict is required of the twelve petit jurors; if they cannot agree there must be a new trial. The judge has always the right and generally considers it his duty to comment upon

the evidence—but he must make it perfectly clear to the jury that they must exercise their own judgment and that they are the judges of the facts, not he; the law, indeed, they must take from him, the facts they must find themselves, no matter what he may think or say. We are fairly speedy in our criminal trials. I have had a great many, both when at the Bar and on the Bench; and have never except once seen ever a murder case take a day and a half. One case was lengthened by the great number of expert witnesses; and this led to a change in the law, limiting the number of expert witnesses to five on a side without special leave of the court.²

In case of an acquittal there is no more to be done but to discharge the accused. In case of a conviction our practice has recently undergone a profound change, the full effect of which cannot yet be estimated—it will be sufficient here to describe it.

A person convicted on indictment may appeal to the Court of Appeal (which in Ontario means either Divisional Court of the Appellate Division of the Supreme Court of Ontario and, consists of five judges) on any grounds of law, or with leave of the Court of Appeal or certificate of the trial judge that it is a fit case for appeal on any ground of fact or mixed fact and law or “with leave of the Court of Appeal on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal.”³

The Court has been very liberal in granting leave to appeal on any fairly arguable ground. An appeal may also be taken by leave of the Court by the convicted person or by the attorney general from the sentence unless that be fixed by law. More appeals succeed in respect of the sentence than in respect of conviction. The Court of Appeal has very large powers on an appeal—and it is not bound to give effect to objections however well founded. The Court is directed by the statute to allow the appeal if of the opinion that the verdict of the jury should be set aside as unreasonable or unsupported by evidence or that the judgment of the trial Court was wrong on a question of law or that on any ground there was a miscarriage of justice but “the Court may

²Rev. Stat. Can. (1906) c. 145, 3-7: “Where in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding.

³Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.”

also dismiss the appeal if notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favor of the appellant, it is also of the opinion that no substantial wrong or miscarriage of justice has actually occurred": in other words the Court is to use common sense (were it a less august body, I should use the words "horse sense") and not trouble about irregularities or even mistakes if substantial justice was done.

While only one judgment is given by the Court of Appeal, if all the judges do not concur, an appeal may be taken to the Supreme Court of Canada. This is rare but not quite unknown.

Theoretically the Judicial Committee of the Privy Council may allow an appeal from either Court, but in practice it never does.

The prerogative of mercy is vested in the central executive of Ottawa—and this seems to be now more sparingly exercised than in the past.

The result—or at least the concomitant—of our criminal law and practice may be of interest.

The Judicial Statistics Branch of the Dominion Bureau of Statistics has just published a Report on Murder, Manslaughter and Attempts to Murder, which is now available.

In the conclusions to be drawn from this report it must always be borne in mind that Canada is a comparatively new country and is blessed or cursed, favored or burdened—select your own word—with a large foreign population. This in two generations or less will be Canadianized, but for the time it runs our percentage up. Most immigrants retain the national revolver or knife but almost all, even of the next generation, forget them.

The report is for the 12-year period, 1914-1925 inclusive.

MURDER PER MILLION

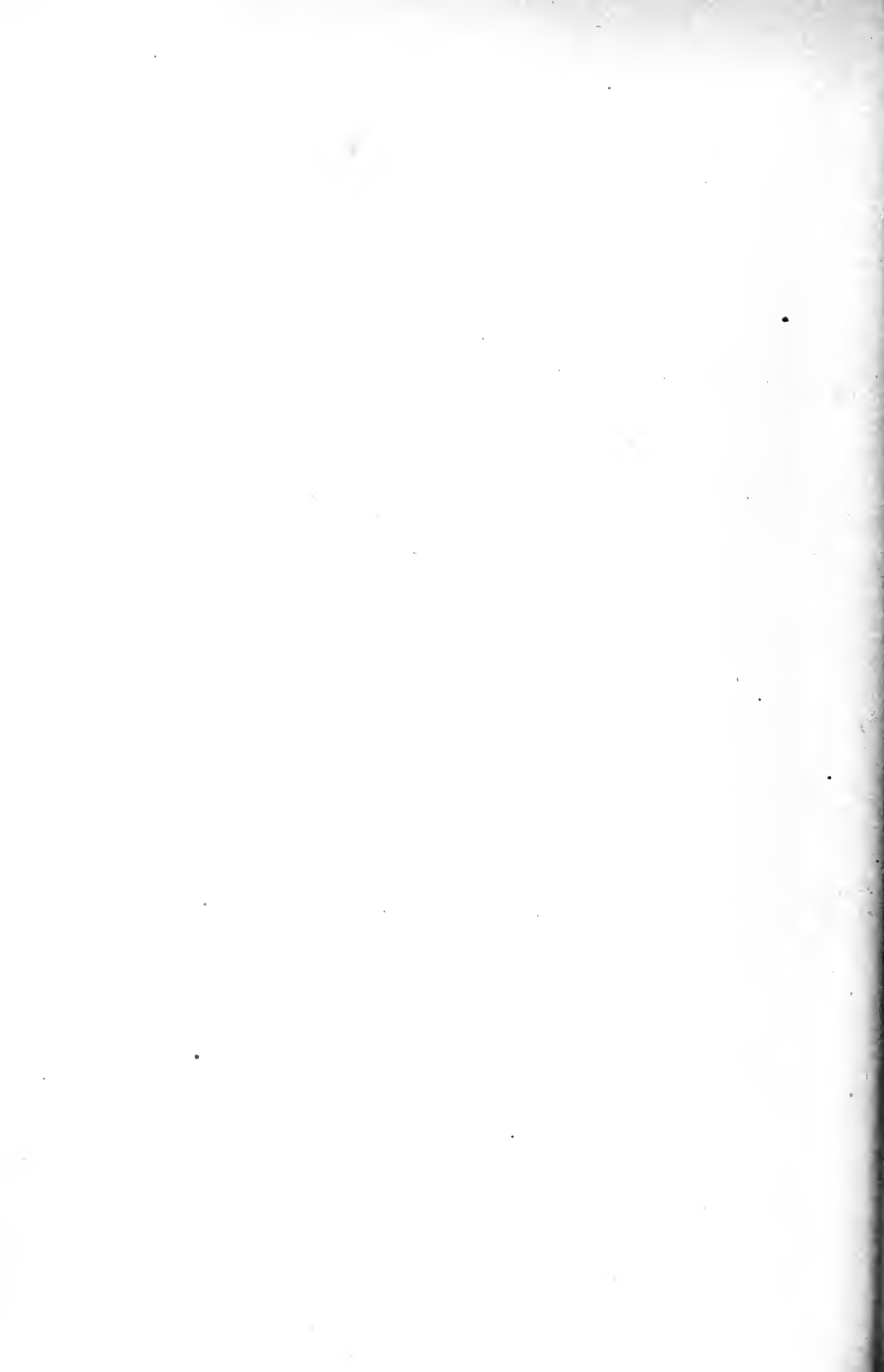
Canadian born.....	11.8
Born in other British possessions.....	29.1
Born in United States.....	69.2
Born in other foreign countries.....	240.3

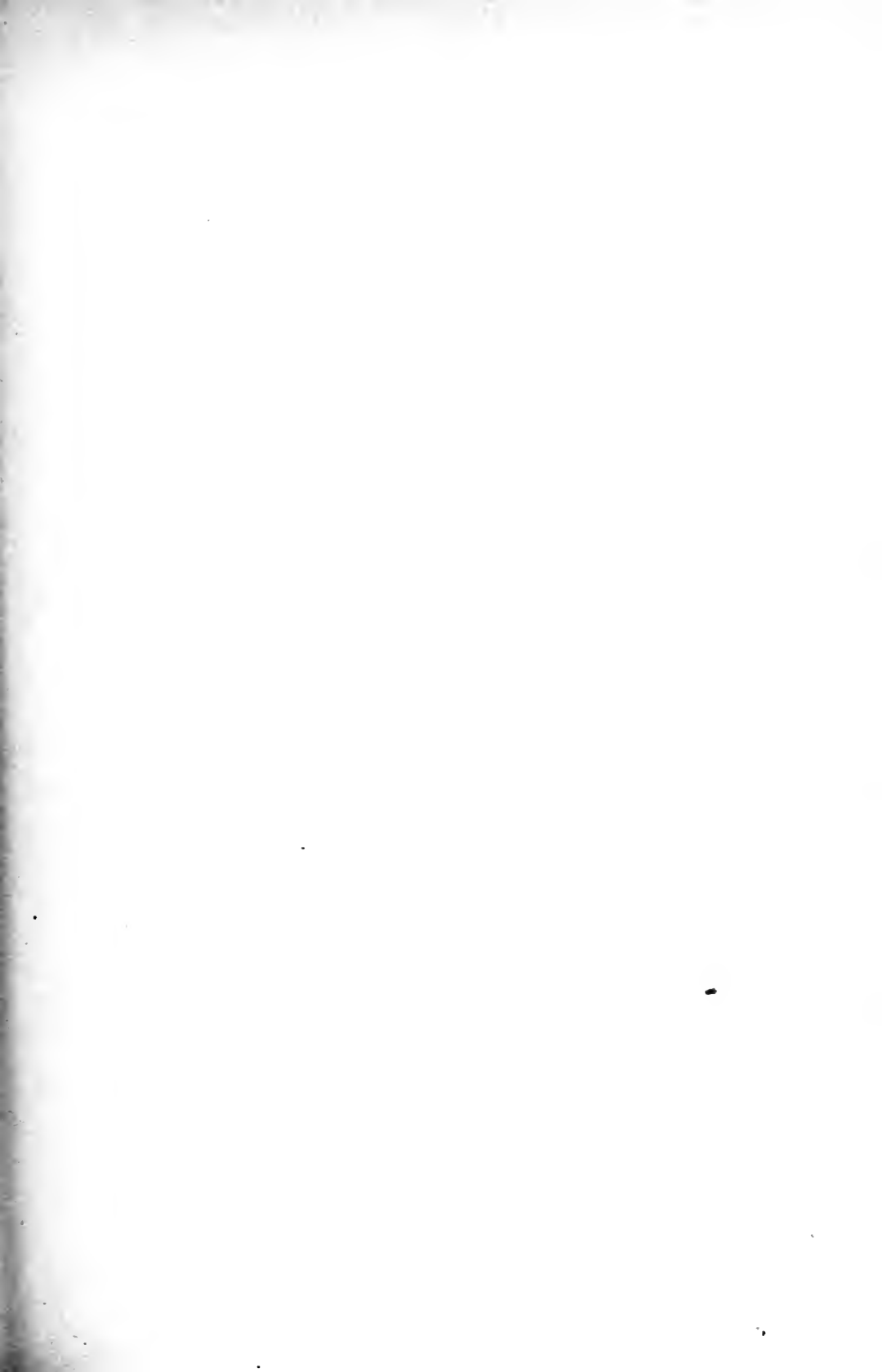
MANSLAUGHTER

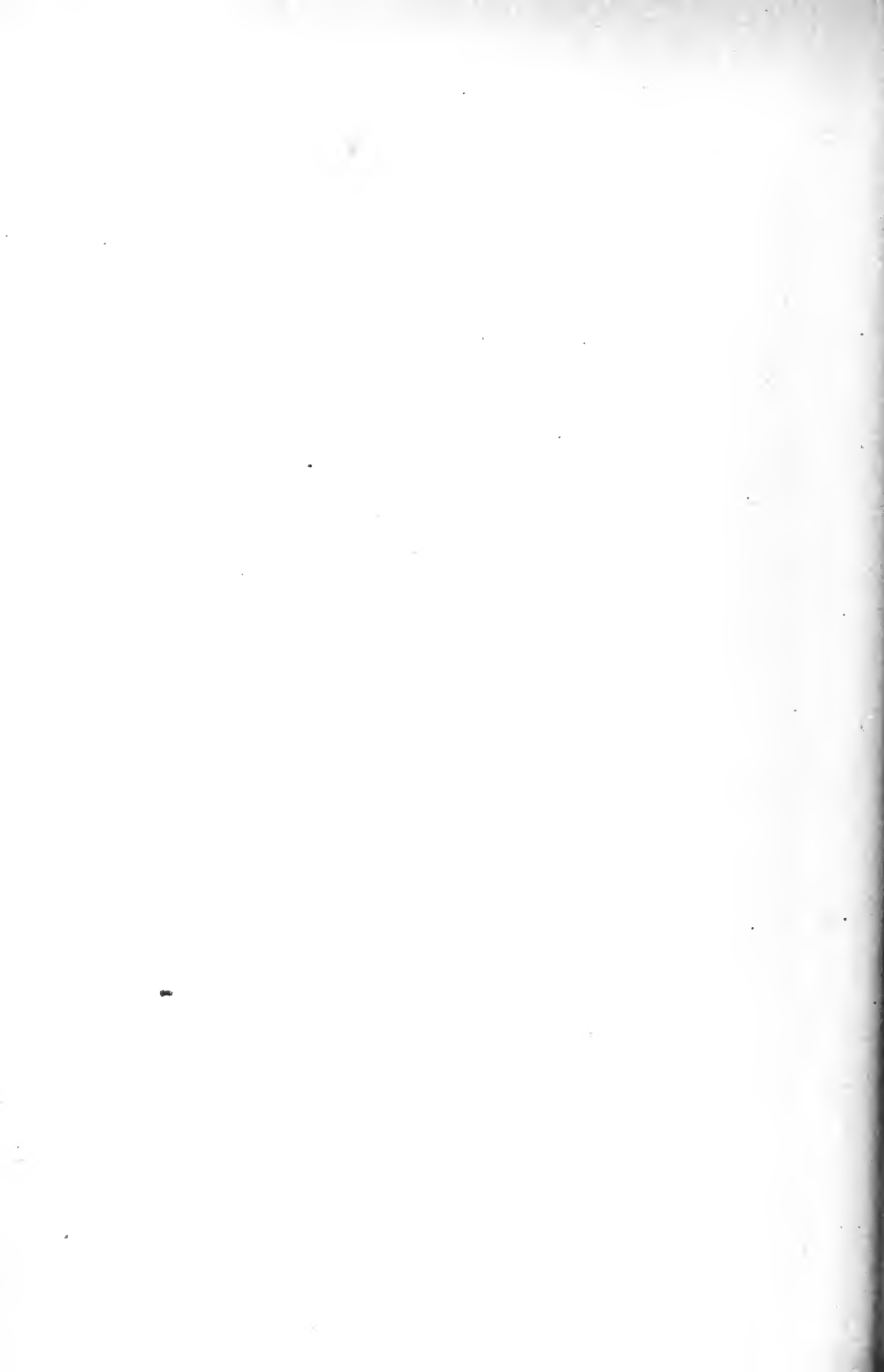
Canadian born.....	31.5
Born in other British possessions.....	43.2
Born in United States.....	93.6
Born in other foreign countries.....	261.6

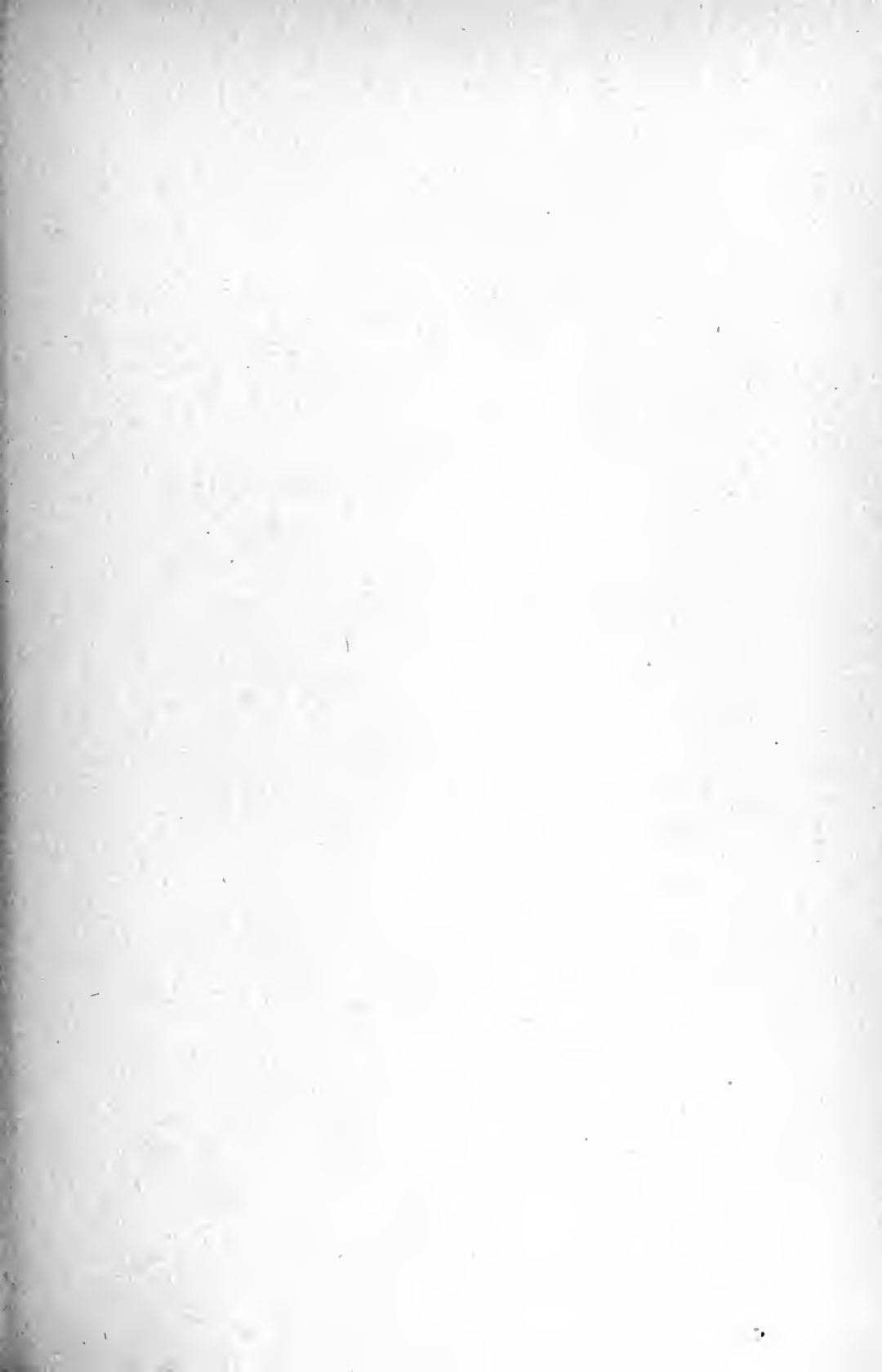
MURDER, MANSLAUGHTER AND ATTEMPTS TO MURDER

Canadian born	52.4
Born in other British possessions.....	91.1
Born in United States.....	224.6
Born in other foreign countries.....	691.9











MINNESOTA LAW REVIEW

JOURNAL OF
THE STATE BAR ASSOCIATION



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An easily understood statement of the

FIRST NATIONAL BANK

Minneapolis

made pursuant to the call of the Comptroller of the Currency
at the close of business on **DECEMBER 31, 1926**

THE BANK HAS ON DEPOSIT:

From its 100,000 depositors - - - - -	\$82,581,535.16
Dividends Payable January 3rd, 1927 - - - - -	330,000.00
It has National Bank Notes in circulation - - - - -	1,701,000.00
(These are secured by Govt. Bonds deposited with the Treas. of the U. S.)	
Letters of Credit and Acceptances - - - - -	3,008,508.64
(This is an obligation of the bank which is retired by liquidation of the imported, exported or domestic merchandise against which the advances were made.)	
Reserved for Interest, Expenses, Taxes - - - - -	488,532.25
(This is an amount set aside daily to take care of the interest due our depositors and to cover taxes and expenses accrued.)	
Interest collected but not earned - - - - -	191,025.48
(This is interest collected in advance [when note is discounted] shown as a liability on our books until earned.)	
*Capital, Surplus and Undivided Profits - - - - -	11,016,037.21

Total - **\$99,316,638.74**

THE BANK HOLDS. (For the purpose of meeting the above obligations.) Cash (This consists of actual cash in our vault and money deposited in the Federal Reserve Bank and other banks.)

Checks on other banks - - - - -	1,409,742.51
(Payable the next day through the Minneapolis Clearing House.)	
Customers' Liability Account,	
Letters of Credit and Acceptances - - - - -	2,812,697.80
(This represents credit given for the purpose of financing merchandise coming into the U. S. from abroad, or merchandise exported or moving within this country.)	
U. S. Government Securities - - - - -	14,359,000.00
Loans to Individuals and Corporations:	
1. Payable to us on demand - - - - -	19,528,842.12
2. Time Loans - - - - -	28,914,679.12
(These are loans to customers of the bank, including the leading business interests of the Northwest. To a large extent they are secured by collateral of greater value than the loans.)	
Bankers Acceptances Purchased - - - - -	295,000.00
Interest earned but not collected - - - - -	318,413.62
(This is interest earned on our investments which has not yet been collected.)	
Bonds (Readily marketable for amount at which they are carried.) - - - - -	8,687,703.65
Banking Houses - - - - -	1,191,297.02

Total - **\$99,316,638.74**

*This Capital, Surplus, and Undivided Profits, is the property of the stockholders which operates as a Guaranty Fund to secure depositors against loss. Added to this the stockholders are additionally liable for \$5,500,000, which gives our depositors the strongest protection possible.

CAPITAL AND SURPLUS, \$10,500,000.00

Combined deposits of First National Bank, Minneapolis Trust Company and Hennepin County Savings Bank, \$107,611,000.46.

before it was necessary? And it was not necessary unless Marbury was an officer. If he was proceeding on an ill-founded right the court would not allow him to force its decision on important constitutional questions. The court, perceiving that it had no original jurisdiction unless Marbury had a right to office, inquired into that right and was driven to decide the constitutional question, only because it found he had the right.

Had the court *assumed* Marbury's right and without particular inquiry on that head passed on to the constitutional questions, it would seem to have been passing on the validity of an act of Congress as an abstract question—in a case where it did not appear to be required by rights of litigants in actual controversy.

Had the court assumed the plaintiff's right and proceeded to hold the act of Congress invalid and therefore ineffectual, would it not justly have been chargeable with going out of its way to annul an act of Congress in what was apparently a moot case? And had the court done this, its decision might justly be called obiter, because we now learn from the opinion in *Myers v. United States* that Marbury was not an officer.

This puts the court in *Marbury v. Madison* in what is indeed a sad dilemma. On one hand where it inquired first whether Marbury was really an officer its decision on that point is said to be obiter dictum by the majority opinion in *Myers v. United States*, because the court had no jurisdiction of mandamus. But on the other hand it is submitted that a decision solely on the constitutional question would have been universally regarded as obiter because rendered in a case where the right of the plaintiff to invoke the original jurisdiction of the court was more than doubtful and not passed upon.

There is no escape from this absurd supposed dilemma of the court except in the view that Marbury's right to office was a jurisdictional question; just as much jurisdictional as whether the act of Congress was valid. It seems certain that this must have been the view of Chief Justice Marshall and his associates. They state the order in which the questions were to be considered and in that order they said they were first to decide whether Marbury was an officer.³ They were not oblivious to so plain a proposition, as that they could not decide merits in a case of which they had no jurisdiction. Conceding that they recognized this very obvious principle they must have regarded Marbury's allegation of right to an office as a jurisdictional averment.

³Marbury v. Madison, (1803) 1 Cranch (U.S.) 137, 154, 2 L. Ed. 60.

THE FINE IN ENGLAND, THE UNITED STATES AND CANADA

By WILLIAM RENWICK RIDDELL*

THE curious fact that the conveyance known in English law as the Fine¹ and in England rightly considered of great value, once seemed about to be adopted in the Province of Ontario and the United States does not appear to have been noticed by our legal writers.

The origin of the Fine is lost in the mists of antiquity—something like it existed in Saxon times and “we have an account in 1038 of a suit in which a verbal conveyance was declared in the

*Justice of the Supreme Court of Ontario, Appellate Division.

¹GENERAL NOTE. It may be of interest to note the manner of “levying a Fine” prescribed by the Statute of 1290, 18 Edward I, St. 4: *Modus levandi Fines*, Ruffhead, 124. I accept his correction of the ancient translation as stated in the Introduction, p. xxxiv—I, also, a little modernise: “When the Writ Original is, in the presence of the parties, placed before the Justices, then a Counsel (contour) shall say: ‘Sir Justice “Conge daccorder” (leave to agree, licentia concordandi): The Justice shall say to him, ‘What will Sir Robert give?’ and shall name one of the parties. Then when they are agreed on the amount of money which is given to the King (i.e. the Post Fine or King’s Silver, ten per cent. of the annual value) then shall the Justice say ‘Cry the peace’ and then the Counsel shall say: ‘Inasmuch as the peace is licensed thus to you, William and Alice his wife, here present, do acknowledge the Manor of B. with the appurtenances (mentioned in the writ) to be the right of Robert had as by gift from them, to Have and to Hold to him and his heirs of William and Alice and the heirs of Alice as in Demesne, Rents, Seigniories, Courts, (the text reads “Counts” a clear lapsus penne), Pleas, Purchases, Wards, Marriages, Reliefs, Escheats, Mills, Advowsons of Churches and all other Franchises and free Customs to the said Manor belonging rendering each year to Robert and his heirs as Chief Lords of the Fee, the Services and Customs due for all Services’ (the Text here seems uncertain but the meaning is clear).

“And be it known that the course of the Law will not suffer that a Final Accord be levied in the Court of the King without a Writ Original and that before at least four Justices en Banc or in Eyre and not elsewhere and in presence of the parties named in the Writ who are (i.e. must be) of full age, of sound mind and out of prison. And if a married woman be one of the parties, then she must first be examined by the said four Justices: and if she do not assent the Fine shall not be levied.

“And the reason why such solemnity should be done in a Fine is that a Fine is so high a Bar and of such great Force and of so puissant a nature in itself that it concludes (‘forclos,’ our ‘forecloses’) not only those who are Parties and Privies to the Fine and their Heirs but also every one else in the world who is of full age, out of prison, of sound mind and within the four seas the day of Fine levied who does not make his claim upon the Foot (of the Fine) within a year and a day.”

gemot."² Plowden speaks of its existence before the Conquest with perfect confidence.³

Indeed in the very nature of things, once you have Bookland, something in the nature of conveyance publicly, coram populo, will be a desideratum and registration expedient: and what more public than a court which it is a duty to attend and what registration more permanent than in the records of a court? The day of public registry offices was not yet anywhere and is not yet in England (except very partially).

However that may be, Glanvil in the reign of Henry II and Bracton in the reign of Henry III speak of the Fine as well-known and long established.⁴ The practice was systematised by the Statute de Modo levandi Fines, (1290) 18 Edward 1.⁵

² Holdsworth, History of English Law, 3d ed., pp. 76, 77, referring to Essays in Anglo Saxon Law, App. No. 28; Kemble, Constitutional Documents, No. 775. I should like to pay tribute to extraordinary value of Professor Holdsworth's work which need not fear comparison with Pollock and Maitland, The History of English Law, so well and favorably known.

³ Plowden in *Stowel v. Lord Zouch*, (1564) 1 Plow. 353, reports that it was said "that fines have been of very great antiquity at the common law for they have been as long as there has been any court of Record." The judges were very enthusiastic in supporting the fine—because it "put a stop to contention and made peace." "Southcote, Weston, Whidon, Dyer and Catline, Justices . . . said that peace and concord is the end of all laws and that the Law was ordained for the sake of Peace. And Dyer said that for Peace Christ descended from Heaven upon the Earth, and his Law which is the New Testament and the old law which are the divine laws, were given only for peace here and elsewhere. And Weston cited St. Augustine, who says, et concordia stat et augetur respublica et discordia ruit et diminuitur. And Catline said that Peace is described in this manner, Pax, mater alma opulentiae, vehitur curru; currus, ubi pax vehitur, dicitur unanimitas; auriga, qui currum regit, dicitur amor; duo equi currum trahentes sunt concordia et utilitas; comites pacis sunt justitia, veritas, diligentia, industria, omnium artium pendarum."

Glanvil was cited by Catline, J., "A Judge of this Realm a long time ago for he died in the Time of King Richard 1 at the City of Aires in the Borders of Juey (i.e. Jewry) attending upon King Richard in his voyage to that Place." Bracton also is quoted at some length.

Stowel v. Lord Zouch, (1564) 1 Plow. 353, 357, 368, 369.

⁴ Glanvil's great work, *De Legibus et Consuetudinibus Angliae*, is now believed by many to have been written by his nephew and secretary Hubert Walter, afterwards Archbishop of Canterbury, Chancellor and Justiciar. 2 Holdsworth, op. cit., 189. The passage referred to is Lib. 8. c. 1: the author adds "*Contingit autem aliquando loquelas motas in Curia domini Regis per amicabilem compositionem et finalem concordiam terminari, sed ex licentia Regis vel ejus justiciarorum*"—but this is certainly too narrow.

See Bracton, *De Legibus et Consuetudinibus Angliae*, Lib. 5, Tit. 5, c. 28—he adds: "*Finis est extremitas unius cujusque rei hoc est idem in quo unaquaque res terminatur, et ideo finalis concordia quia imponit finem litibus.*"

The well known legal maxim, *Interest republicae ut sit finis litium*, was frequently invoked in olden times. cf. 2 Blackstone, Commentaries on the Laws of England 349, 350.

The Fine was a conveyance of land in the presence of the court—the court might be the King or his justices either at Westminster or itinerant, the bishop in his court, the comitatus or county court—indeed any court of record.⁶

After the Statute de Modo levandi Fines which forbade "a final Accord to be levied in the King's Court without a Writ Original," the Fine was in form the compromise of an action; but before that statute this was not always the case. For example, we find in Easter Term, 2 John (1201) a Record in Curia Regis in a Cambridgeshire case in which Philip de Sumeri defends an action concerning the third part of a knight's fee by setting up "cartam quandam Hugonis Archeri, in qua continetur quod idem Hugo . . . illam vendidit et quietam clamavit Philippo de Sumeri et heredibus suis totum jus quod habuit in ea pro x. solidis et j. pallio viridi in curia Rogeri de Sumeri . . . et Philippus interrogatus utrum illa finis facta esset per breve regis vel justiciariorum dicebat quod non fuit lis inter eos per aliquod breve sed per voluntatem utriusque"—a certain grant of Hugh Archer (the plaintiff) in which it is contained that the said Hugh sold it and quitted claim to Philip de Sumeri and his heirs all the right which he had in it for ten shillings and one green cloak in the Court of Roger de Sumeri . . . and Philip being asked whether that Fine was made by Writ of the King or the Justices said that there was no litigation between them by any Writ but (the Fine) was by mutual agreement.⁷

It is possible that this Fine might not be held valid, as we find the further entry. "Concordati sunt"—they settled; and further: "Dies datus est Philippo de Sumeri et Hugoni Archeri de placito recipiendi cirographum⁸ suum a die Pasche⁹ in v septimanas.

⁶Some consider that this so-called Statute was not in reality a Statute but rather a Rule of Court. Pollock and Maitland, *op. cit.*, p., p. 94, n. 3, referring also to the Statute de Finibus Levatis, 27 Edward 1, *Ibid.*, p. 98, n. 6, "It is to be distinguished from the unquestionable Statute de Finibus Levatis of 27 Edw. 1." Whatever it was, it was considered to have the force of a statute and I do not depart from the traditional terminology.

⁷See any of the old law writers.

⁸Curia Regis Rolls of the Reigns of Richard 1 and John 447, 448. It will be seen that this Fine was not "Sur cognizance de droit, come ceo que il ad de son done," the usual form in later days; but "Sur concessit." 2 Blackstone, Commentaries 352, 353.

⁹Curia Regis Rolls 253. "cirographum" or "cyrographum" (literally "handwriting") was the technical term, generally employed for the deed in a Fine. The terminology "levying a Fine" always employed in later times does not seem to have yet been adopted—a "Finis" is always "facta," made, never "levata," levied; and the cognizee has a day "habendi (or ad recipendum) cirographum suum" not "levandi, &c."

Philippus de Sumeri ponit loco suo Ricardum Capellanum ad recipiendum cirographum suum . . ."—a day is given to Philip de Sumeri and Hugh Archer in their action to receive their chirograph, five weeks after Easter. Philip de Sumeri appoints Richard Chaplain his attorney to receive his chirograph.¹⁰

But of a record in Trinity Term, 2 John, (1200), there can be no doubt:

"Oxon.' Baking.'—Hec¹¹ est convencio facta inter Radulfum Hareng' et Willelmum de Weberi et coram G. filio Petri capitali iusticiario et Simone de Pateshull' et Ricardo Heriet et sociis eorum de tenementis subscriptis, unde tamen placitum non fuit in curia regis coram eis, scilicet quod predictus Willelmus concessit eidem Radulfo . . . Omnia hec¹² predicta tenementa predictus Willelmus et heredes sui warrantizabunt predicto Radulfo et heredibus suis [et] totum jus et clamium quod habet in terris et in feudis que¹³ aliquis ei deforciat in Anglia."

Oxford, Buckingham. This is the agreement made between Ralph Hareng and William de Veber and before Geoffrey Fitz-Peter, Chief Justiciar, and Simon Pateshull and Richard Heriet and their associates concerning the tenements hereunder written in respect of which there was no plea in the Curia Regis before them, that is to say, that the said William grants to the said Ralph (here follows the agreement which I do not translate in full—in substance, de Veber grants to Hareng, his Manor, the "homagium" of certain named persons and their heirs and certain services "in wood and field, in meadows and pastures, in meres and mills . . ." for a rental of ten marks—£6.13.4—yearly, five payable at Easter and five at Michaelmas—a Fine "sur concessit"). All the said tenements the said William and his heirs will warrant to the said Ralph and his heirs (and) the right and claim which he has in the lands and fees which anyone in England may deforce him of.¹⁴

Pollock and Maitland's explanation of the expression, "levying a Fine" is ingenious: "It may take us back to the Frankish *levatio chartae*, the ceremonial lifting of a parchment from the ground . . ." 2 Pollock and Maitland, *op. cit.* 98. "Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the earth and thence it is solemnly lifted up or 'levied' (*levatio chartae*): Englishmen in later days know how to 'levy a fine.'" Ibid, 86.

¹⁰In these MSS., our diphthong "æ" is written "e", e.g., Pasche for Paschæ, Hec for Hæc, que for quæ, concordie facte et concesse for concordie factæ et concessæ.

¹¹Curia Regis Rolls 183.

¹²See note 9. ¹³See note 9.

¹⁴Curia Regis Rolls 74. Then "for this gift and concession," Ralph acquies William against Annora de Sancto Walterico, 100 marks.

Even at this time generally and, as we have seen, later always, in order to levy a Fine there was an action at law, very commonly though not always a collusive action. The authorities say that the usual writ was a Writ of Covenant alleging a covenant by the vendor of the land to sell it to the purchaser, although a Writ of Mesne, of Warrantia Chartae, de Consuetudinibus et Servitiis, &c, might be employed. No doubt, the Writ of Covenant was the usual writ when the action had become collusive and the Fine a mere method of conveyancing; but in earlier times, I find the Writ of Novel Disseisin, of Mort d'Ancestor, of Right, &c., all employed—and the rule came to be recognized that any original writ would answer.

The Fine might be made before the King himself generally with some of his Justices. E.g. in Hilary Term, 2 John, (1201), a Fine is set up which had been made "in curia domini regis apud Marleberge coram domino rege H. patre Rannulfo de Glanvill' Willelmo Ruffo justiciariis"—in the Court of our Lord the King at Marlbridge before our Lord King Henry II, father (of the present King), Ranulph de Glanville and William Ruffus, Justices.

Generally the King is absent and the Fine is "coram Justiciariis" either "apud Westmonasterium" or "iterantibus." Other Courts had jurisdiction: e.g., in Hilary Term, 10 Richard II. (1199) we find—

"Glouc' Dies datus est abbati de Cirencestr' et Barlet de placito concordie facte et concesses¹⁵ coram H. Cantuariensi archiepiscopo a die Pasche¹⁶ in xv dies ut per archiepiscopum sciatur forma concordie"¹⁷. Gloucestershire—A day is given to the Abbot of Cirencester and Barlet (or Barbet) concerning a plea of a Fine made and granted before Henry Archbishop of Canterbury on the Quindene of Easter that it may be known from the Archbishop what is the form of the Fine."

Sometimes the King intervened personally, and forbade a Fine to be levied. In a long Record in Eastern Term, 2 John, (1201), we have an instance of royal interference¹⁸: In a Sussex

(The next entry is about a kinswoman of mine, Sibyl Ridel, who had lost her land "in manum regis" and wanted it back. There is a story about Sibyl, "but that is another story").

¹⁵See note 6.

¹⁶See note 9.

¹⁷See note 14. "Barlet" is properly "Barbet" (Barbectus).

¹⁸It was such interferences that led to the famous chapter xxix of Magna Carta: "... Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam." It will be seen that King John was not the first

case a complaint is made by certain men of Prunhulle (now Broomhill) that the Abbot of Battle (de Bello) and the Abbot of Robertsbridge (de Ponte Roberti) made a Fine in the Curia Regis in the time of Henry II, of a certain fen belonging to the men: they offer a fee to the King to have the matter inquired into by a jury. The Abbot of Battle comes and says that he recovered the land from the Abbot of Robertsbridge on a writ of Novel Disseisin, that the latter then brought a Writ of Right and then they made a Fine—the Abbot of Robertsbridge agreed in this. The men of Prunhulle in addition to a plea on the merits, “*adicunt etiam quod Steffanus de Turnham tulit domino G. filio Petri breve regis, in quo continebatur quod finis non fieret inter eosdem abbates si esset ad nocumentum hominum de Prunhull; et inde voca(n)t ipsum dominum G. ad warantum*—also said that Stephen de Turnham¹⁹ bore to my Lord Geoffrey Fitz-Peter (Chief Justiciar) the King’s Writ in which it was contained that there should be no Fine between these Abbots to the injury of the men of Prunhulle, and therein they vouch the said Lord Geoffrey to warranty. Not having this prohibitory writ in court they could not proceed—and they were not content to rely solely on it but desired to prove their plea that the Assize on the Writ of Right did not cover this fen but only a certain property called Frith, and that the Abbot of Battle the defendant did not justly occupy the fen of some fifty acres. Accordingly they paid five marks (£3.16.8) to the King for an enlargement to the Quindene of Michaelmas.²⁰

Of course a fee had to be paid to the King for the Writ to begin the action—this fee called the Primer Fine (Premier or Pre-

to send prohibitory Writs to the Judges. The Record quoted is in 1 Curia Regis Rolls 467.

¹⁹See 1 Curia Regis Rolls 467. From other entries, it appears that Stephen de Turnham or de Thorneham was one of the Justices: 1 Curia Regis Rolls 72.

²⁰The story is completed in 2 Curia Regis Rolls 102, 237, 312. In Michaelmas Term, 4 John, (1202), a Great Assize was called to determine whether the Abbot of Battle was seized in his domain of the whole fen between Swansemere and Lachene (now Chene) belonging to the Manor of Prunhulle—this was enlarged to three weeks after St. Hilary’s day. In Easter Term 4 John (1203), they agreed, and a day was given “*hominibus de Prumhill*” per atornatos suos et Johanni abbati de Bello ad capiendum cirographum in iij septimanas post festum sancte Trinitatis—to the men of Broomhill by their attorneys and to John, Abbot of Battle, to receive their chirograph, three weeks after the Feast of the Holy Trinity. This was again enlarged, Trinity Term, 5 John, (1203) to a month after Michaelmas.

It will be seen that the men of Broomhill and the Abbot of Battle levied a Fine.

fine) was in Blackstone's time one-tenth of the annual value of the land.²¹

Then the parties pretended to agree on terms of settlement—the concordia. As much of the royal revenue in olden times was derived from the Courts, and a litigant who failed was "in misericordia," in mercy and was liable to pay a fine to the King²² he would lose money if an action were settled—consequently it was but just to the King that he should receive a fee for consenting to a settlement of the action. Cases were known in which a litigant withdrawing or settling without the leave of the King or his justices was fined or imprisoned.²³

Accordingly when the consent of the King's Justices was obtained, the King became entitled to another fee, the Post Fine, often called the King's Silver, which in Blackstone's time was three-twentieths or 15% of the actual value of the land. This consent was generally called *licentia concordandi* and made the agreement effective.

Then came at least in later times, for I find no trace of it in the times of Richard I and John, the note of the Fine, an abstract of the Writ and the Agreement. A Statute of 1403, 15 Henry IV, c. 14, reciting that many Feet of Fines were in the treasury and the notes in the Common Bench, directed that the notes should be inrolled and remain in the custody of the chief clerk of the Common Bench.

Then the fifth step—the Foot of the Fine including the whole matter. This, from July 15, 1195, when Hubert Walter devised the form of engrossing Fines,²⁴ was written in triplicate by the

²¹Sellon, *The Practice of the Courts of King's Bench and Common Pleas*, 2d ed. gives a sufficiently full account of the practice. William Cruise's more elaborate work, *An Essay on the Nature and Operation of Fines and Recoveries*, 2d ed., may also be consulted (I have placed a copy in the Riddell Canadian Library at Osgoode Hall. See Note 45 *infra*.)

²²In some cases the fine might be remitted for special circumstances, e.g., the poverty, or nonage of the suitor.

²³E.g. in Hilary Term, 2 John, (1201), 1 *Curia Regis Rolls* 411. "Cantebr.—Johannes de Wasingel' venit in curiam et quietos clamavit Ricardum de Wasingel' et Widonem de Fukeswrthe et Rogerum Malartes de morte patris sui, unde fecerat eos attachiari et retraxit se. Et preceptum est quod habat breve ad vicecomitae quod ipse et plegii ejus sint quieti et ut capiat corpus Johannis et mittat eum in gaoliam"—Cambridgeshire—John of Wasingale came into Court and acquitted Richard of Wasingale and Guy of Folksworth and Roger Malartes of the death of his father whereof he had had them attached and withdrew. And it was ordered that he (Richard) should have a writ to the sheriff releasing him and his bondsmen and that he (the sheriff) should take the body of said John and put him in gaol.

chirographer of the Court of Common Bench—which court had a monopoly of Fines after the differentiation following Magna Carta. Each of the parties, Conusee (plaintiff, purchaser) and Conusor (defendant, vendor) received a copy of the chirograph and the third, the real Foot of the Fine, was kept in the royal treasury.²⁵ An unbroken series of Feet of Fines there remains from 1195 till the abolition of Fines in 1834 by the Act, 3, 4, William IV, c. 74.

A day was given to the parties in early times to come into Court for their copy,²⁶ and they had to take it up or be “in mercy.”

In the case of a married woman’s land, she was examined apart by the justices as to her consent; and one of the main advantages of the Fine was that thus a married woman was allowed effectively to dispose of her land by joining with her husband in levying a Fine—she could not thereafter, when her husband died sue out a Writ of Cui in Vita.

Other advantages are detailed by Blackstone and the common law writers: but so far as I can find, the Fine was used on this Continent only to convey the lands of married women—and by that time the practice had become purely formal and collusive and at the same time very expensive.²⁷

In the North American Colonies afterwards the United States, the Fine seems to have been little used—and when used, only for the purpose of conveying the lands of married women.

In one Colony, New York, notwithstanding certain remarks in one of the cases cited below, it was in use beyond question; in another, Massachusetts, it is authoritatively stated that it was not—in some others, it seems to be doubtful.

It may be well to look at the decisions:

In *Clay v. White*,²⁸ Mr. Justice Roane says: “a fine . . . would be . . . effectual were it not obsolete in this country.”

²⁴² Holdsworth, A History of English Law 184. In vol. 3, pp. 223, sec., of this excellent work a very accurate and admirable account is given of Fines.

²⁵In Trinity Term, 2 John, (1200), I find in a Norfolk case, William Chaplain, attorney for Roger of Brandon claiming half the advowson of the Church at Brandon under a Fine made before the Justices Itinerant, “et pedem cirographi . . . est in thesauro.” 1 Curia Regis Rolls 208.

²⁶For example in Trinity Term, 2 John (1200), 1 Curia Regis Rolls 197, a day is given one month after Michaelmas to the parties (named) “de recipiendo cirographo suo.” “Et Eborardus habet notam, quam Galfridus Clericus de Tademerton’ scripsit”—and Everard has the note which Geoffrey, the Clerk of Tademerton (in Oxfordshire) wrote.

²⁷Sellon, op. cit., p. 477, says that in order to complete a Fine “they must pass through the several following offices . . . viz: the Alienation

In *Knight v. Lawrence*,²⁹ after stating that, "By the ancient common law the method of conveying a married woman's lands was for her to unite with her husband in levying a Fine," the court by Mr. Justice Elliot said, that³⁰ "the common law methods are practically obsolete in Colorado at the present time."

In *Woodbourne v. Borrel*,³¹ the court refrained from expressing an opinion as to the Fine before the Revised Statutes of 1751.

In Maryland the Fine seems to have been in use before the Act of 1751.³²

In Massachusetts, it is positively stated by Chief Justice Parsons in *Fowler v. Shearer*,³³ that estates had never been conveyed by a Fine there. Chief Justice Taylor in *Jackson v. Gilchrist*³⁴ says speaking of the Fine:

"It may, however, I think, be assumed that in point of fact and as a matter of practice, the common law in this respect has never been adopted with us: and it may not be amiss briefly to observe that in some of our sister states which were British Colonies and, equally with us subject to the common law, the mode of acknowledgment adopted in this case has been substantially recognized and sanctioned."

Then he says:

"I have barely referred to some cases that have arisen in other states . . . to show that the common law mode of conveyance by Fine was not in practice there, nor, most likely in any of the British American colonies."

I find some difficulty in understanding this judgment in view of other New York cases. *Rosebloom v. VanVechten*³⁵ speaks of the Fine being provided for by an Act of 1808 and the Revised Laws of 1813—an Act of 1828 repealed the former legislation from and after the end of 1829.

In *Jackson ex dem. Watson v. Smith*,³⁶ a Fine sur cognizance de droit come ceo que il ad de son done levied in 1805 was under consideration—it was held valid: In *Jackson v. Gilchrist*,³⁷ the

office, the Return office, the Warrant of attorney office, the Custos Brevium office, the King's Silver office and the Chirographer's office.

²⁸(1810) 1 Mun. (Va.) 162, 173.

²⁹(1894) 19 Colo. 425, 435, 36 Pac. 242.

³⁰(1894) 19 Colo. 425, 436, 36 Pac. 242.

³¹(1872) 66 N. C. 82.

³²*Nicholson's Lessee v. Hemsley*, (1796) 3 Md. 409; with this accords *Hitz v. Jenks*, (1887) 123 U. S. 297, 8 Sup. Ct. 143, 31 L. Ed. 156.

³³(1810) 7 Mass. 20.

³⁴(1818) 15 John. (N.Y.) 89, 109.

³⁵(1845) 5 Den. (N.Y.) 414.

³⁶(1816) 13 John. (N.Y.) 426.

³⁷(1818) 15 John. (N.Y.) 89.

question was raised whether before the Act of 1771 a married woman could convey her real estate except by a Fine. In *Albany Fire Insurance Co. v. Bay*,³⁸ Mr. Justice Jewett points out: "By our usages and laws we have substituted her deed for a conveyance of lands in the place of the common law mode for Fine."

In *McGregor v. Comstock*,³⁹ there was under consideration a Fine levied in 1827: it was held good after a learned and elaborate discussion.

The Supreme Court of the United States in *Hitz v. Jenks*⁴⁰ states that from 1715, in Maryland, "the conveyance of the estates of married women by deed with separate examination and acknowledgment has taken the place of the alienation of such estates by Fine in a court of record under the law of England."

In *First National Bank v. Roberts*,⁴¹ is an elaborate discussion of the Fine which is called "the prototype of the more modern method prescribed by Statute," but the discussion is not helpful in the present inquiry.

Nothing of a more definite character seems available as to the prevalence of the Fine in the thirteen colonies.

In Pennsylvania as early as 1706, we find legislation which provides,^{41a} "that from henceforth no woman shall be debarred of her right . . . in any lands . . . in her own right . . . sold aliened or conveyed by her husband during coverture unless she be party to such deeds . . . and be examined secretly and apart by the justice or justices . . . whether she be content of her own free will to part with her right . . ." and the justice or justices might examine as to her age. This act was disallowed by the Queen in Council, and a more comprehensive one chapter clxx, passed in February 1711 was also disallowed—I do not trace the subsequent legislation.

Coming further north into what is now Canada, I find no trace of the Fine in Nova Scotia, New Brunswick or Prince Edward Island.

In Quebec except for the short time between the Royal Proclamation of 1763 and the Quebec Act of 1774, the French Civil law prevailed which knew not the Fine.

In the territory which became the Province of Upper Canada, the French Civil law was in force in December, 1791 when

³⁸(1850) 4 Comst. (N.Y.) 9.

³⁹(1858) 17 N. Y. 162.

⁴⁰(1887) 123 U. S. 297, 301, 8 Sup. Ct. 143, 31 L. Ed. 156.

⁴¹(1890) 9 Mont. 323.

^{41a}Pa. St. at L. c. 135 sec. 3.

the new Province began its separate career and until the passage in September 1792 of the Act, 32 George III, c. 1 (U.C.) which by section 3 introduced the Laws of England in all matters of property and civil rights.

The Province was divided into four districts each with a Court of Common Pleas with full civil jurisdiction: the records of all these courts are extant⁴² and no reference to a Fine being levied is to be found therein.

But in 1794, these courts were abolished and a Court of King's Bench instituted⁴³ with all the jurisdiction of the Courts of King's Bench, Common Bench and (as to revenue) Exchequer in England.

The Term Books of this Court which lasted till 1881 are extant: and there are to be found entries of passing Fines by married women.

In Easter Term 39 George III, Friday, April 12, 1799, the entry appears in the Term Book. Present, Elmsley, C. J., and Powell and Allcock, JJ.

"Mrs. Elmsley⁴⁴ appeared in court to pass a Fine."

In Michaelmas Term, 42 George III, Wednesday, November 11, 1801, before Elmsley, C. J., and Powell, J.

"William Jarvis, Esquire, and his wife Hannah, came into Court and suffered a Fine and Recovery, etc. to R. I. D. Gray, Esquire."⁴⁵

⁴²Reprinted in 14 Ontario Archives Reports, (1917) pp. 25 sqq: The Records of the Court of Common Pleas for the District of Hesse including Detroit are also to be found reprinted with notes in my Michigan Under British Rule, 1760-1796, Michigan Historical Commission, Lansing, 1926.

⁴³By the Act (1794) 34 George III, c. 2 (U.C.)

⁴⁴Mrs. Elmsley was the wife of the chief justice (Term Book p. 80) —they were both English and he had been a member of the English Bar.

⁴⁵William Jarvis was our first Provincial Secretary; his wife Hannah was born in Hebron, Connecticut, the daughter of the Revd. Samuel Peters, a Loyalist, who went to England on the outbreak of the Revolution. Robert Issac Dey Gray, was the son of Major James Gray, a Loyalist: the son received a License to practise Law under the Act of 1794 and in 1797 became our first Solicitor General. He was drowned in the "Speedy" disaster in October, 1804.

It may be of interest to note that my copy of Cruise—See Note 21, supra, was once the property of Gray—it contains on the fly leaf the following in the Solicitor-General's handwriting: "Purchased of Mr. White's auction, 15th April. 1800, 12s6d. Robt. I. D. Gray." "Mr. White" was John White, an English Barrister, our first Attorney General, 1792-1800: he was killed in a duel by John Small, January 4, 1800: the Law Society of Upper Canada desired to purchase his library but for some reason failed (probably *res angusta domi*), and Hon Peter Russell, White's executor sold the books by auction, April 11, 15—William Cooper whom we shall meet again being auctioneer. See my Legal Profession in

There were others but the passing of them was not recorded in the Term Books: and the parties were not quite content with any of them.

The matter came up in the Provincial Parliament.

On Monday, February 7, 1803, in the Legislative Council, almost immediately after passing the Address, Hon. James Baby, formerly of Detroit, brought in a Bill "to enable married women having real estate more conveniently to alien and convey the same." It was read that day; February 12, it was considered in Committee of the Whole, the attention of the committee was called to the Fines levied in the Court of King's Bench without all the formalities required by the practice and it was determined to validate them by legislation. Accordingly, the Bill was amended in committee so as also "to confirm and declare valid four several Fines heretofore levied or intended to have been levied in the Court of King's Bench in this Province." It passed its third Reading, February 14, and was engrossed and sent down to the Legislative Assembly. The Houses were at odds over an alleged contempt of the Assembly by David Burns, Master in Chancery in the Council, but Robert Isaac Dey Gray, the Solicitor General who was a Member of the Assembly succeeded in persuading that House to proceed with the business of the Session. February 17, the Bill went to Committee of the Whole: the next day there was no quorum but, February 22, it was reported with amendments, next day engrossed and sent up to the Council. The Council requested a Conference which was agreed to: the Assembly Conferees⁴⁶ insisted on dropping the part of the Bill validating the Fines but withdrew all other objections: the Council agreed and the Bill was passed in that form.

The solicitor general was personally interested and there was no real objection to the measure: he accordingly on Tuesday, March 1, brought in a Petition on behalf of himself and four others to validate "four several Fines" which he "together with (Chief Justice) the Honorable John Elmsley and William Cooper had been concerned in levying . . . in the Court of King's

Upper Canada, &c., Toronto, 1916, pp. 84, 151-153. The volume was afterwards the property of Clarke Gamble, K. C., and was given me by his son, H. D. Gamble, K. C., of the Toronto Bar.

⁴⁶The conferees from the Assembly were Sheriff Macdonell, Isaac Swayze, E. Washburn, Robert Nelles, Angus Macdonell and Robert Isaac Dey Gray, Solicitor General, the two last-named being lawyers; William Hamilton and Richard Cartwright who though laymen had both been Judges of the Court of Common Pleas represented the Council.

Bench in this Province . . . being advised that the said Fines are not legal on account of the want of the necessary officers to carry through the same."

He introduced a Bill, seconded by Ralfe Clench of Niagara which passed all its Readings the same day—sent up to the Council, it there passed all its Readings that same day—and but required the Royal Assent to become law. But this was the one Bill of the Session to which His Excellency, General Peter Hunter, the Lieutenant-Governor of Upper Canada, on March 5 "was pleased to withhold his Assent to."⁴⁷

Hunter was not a lawyer: in none of his despatches to the secretary of state is any information given of his reason for refusing the Royal Assent⁴⁸: it was believed at the time to be due to the advice of Chief Justice Allcock—his reason has not come down to us.⁴⁹ However, in those days the governor actually governed: he had not yet become *lucus a non lucendo*, he had some say in legislation and was responsible to no one but the King and the Ministry at Westminster. Nothing could be done and the attempt was not again made—the defective Fines were replaced by valid conveyances under the Act now to be mentioned.

The "Act to enable Married Women having Real Estate more conveniently to Alien and Convey the Same" was assented to after being denuded of the provisions validating the Fines—and the Fine was never again resorted to.

This act⁵⁰ provided for the examination of the married women in open Court before the Court of King's Bench or any judge in chambers or at an Assize as to her consent, following closely the legislation in some of the American Colonies. There continued to be an examination of the married woman grantor in this Province until 1873 when the Legislature having got over the idea that the wife is the weaker vessel killed it⁵¹ after a life of three score and ten years.

⁴⁷For the proceedings in the Legislative Council see 7 Ontario Archives Reports (1910) pp. 179, 184, 185, 190, 191, 192, 198: in the Legislative Assembly, see 6 Ontario Archives Reports (1909), pp. 355, 360, 363, 364, 369, 372, 373, 374, 375, 383, 409.

⁴⁸Canadian Archives, Q. 244, pp. 43, 49, 66, 140.

⁴⁹There is a hint in one contemporary letter that Allcock had a grudge against Gray: another suggests a feeling against the Elmsleys—but all that is gossip, more or less malicious.

⁵⁰(1803) 43 George III. c. 5. (U.C.)

⁵¹Ontario Statutes (1873) 36 Vict., c. 19, (Ont.).

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THE FINE IN ENGLAND, THE UNITED STATES AND CANADA

BY WILLIAM RENWICK RIDDELL*

THE curious fact that the conveyance known in English law as the Fine¹ and in England rightly considered of great value, once seemed about to be adopted in the Province of Ontario and the United States does not appear to have been noticed by our legal writers.

The origin of the Fine is lost in the mists of antiquity—something like it existed in Saxon times and “we have an account in 1038 of a suit in which a verbal conveyance was declared in the

*Justice of the Supreme Court of Ontario, Appellate Division.

¹GENERAL NOTE. It may be of interest to note the manner of “levying a Fine” prescribed by the Statute of 1290, 18 Edward I, St. 4: *Modus levandi Fines*, Ruffhead, 124. I accept his correction of the ancient translation as stated in the Introduction, p. xxxiv—I, also, a little modernise: “When the Writ Original is, in the presence of the parties, placed before the Justices, then a Counsel (contour) shall say: ‘Sir Justice “Conge daccorder” (leave to agree, licentia concordandi): The Justice shall say to him, ‘What will Sir Robert give?’ and shall name one of the parties. Then when they are agreed on the amount of money which is given to the King (i.e. the Post Fine or King’s Silver, ten per cent. of the annual value) then shall the Justice say ‘Cry the peace’ and then the Counsel shall say: ‘Inasmuch as the peace is licensed thus to you, William and Alice his wife, here present, do acknowledge the Manor of B. with the appurtenances (mentioned in the writ) to be the right of Robert had as by gift from them, to Have and to Hold to him and his heirs of William and Alice and the heirs of Alice as in Demesne, Rents. Seigniories, Courts, (the text reads “Counts” a clear lapsus pennae), Pleas, Purchases, Wards, Marriages, Reliefs, Escheats, Mills, Advowsons of Churches and all other Franchises and free Customs to the said Manor belonging rendering each year to Robert and his heirs as Chief Lords of the Fee, the Services and Customs due for all Services’ (the Text here seems uncertain but the meaning is clear).

“And be it known that the course of the Law will not suffer that a Final Accord be levied in the Court of the King without a Writ Original and that before at least four Justices en Banc or in Eyre and not elsewhere and in presence of the parties named in the Writ who are (i.e. must be) of full age, of sound mind and out of prison. And if a married woman be one of the parties, then she must first be examined by the said four Justices: and if she do not assent the Fine shall not be levied.

“And the reason why such solemnity should be done in a Fine is that a Fine is so high a Bar and of such great Force and of so puissant a nature in itself that it concludes (‘forclos,’ our ‘forecloses’) not only those who are Parties and Privies to the Fine and their Heirs but also every one else in the world who is of full age, out of prison, of sound mind and within the four seas the day of Fine levied who does not make his claim upon the Foot (of the Fine) within a year and a day.”

gemot."² Plowden speaks of its existence before the Conquest with perfect confidence.³

Indeed in the very nature of things, once you have Bookland, something in the nature of conveyance publicly, *coram populo*, will be a desideratum and registration expedient: and what more public than a court which it is a duty to attend and what registration more permanent than in the records of a court? The day of public registry offices was not yet anywhere and is not yet in England (except very partially).

However that may be, Glanvil in the reign of Henry II and Bracton in the reign of Henry III speak of the Fine as well-known and long established,⁴ The practice was systematised by the Statute de Modo levandi Fines, (1290) 18 Edward 1.⁵

² Holdsworth, History of English Law, 3d ed., pp. 76, 77, referring to Essays in Anglo Saxon Law, App. No. 28; Kemble, Constitutional Documents, No. 775. I should like to pay tribute to extraordinary value of Professor Holdsworth's work which need not fear comparison with Pollock and Maitland, The History of English Law, so well and favorably known.

³ Plowden in *Stowel v. Lord Zouch*, (1564) 1 Plow. 353, reports that it was said "that fines have been of very great antiquity at the common law for they have been as long as there has been any court of Record." The judges were very enthusiastic in supporting the fine—because it "put a stop to contention and made peace." "Southcote, Weston, Whidon, Dyer and Catline, Justices . . . said that peace and concord is the end of all laws and that the Law was ordained for the sake of Peace. And Dyer said that for Peace Christ descended from Heaven upon the Earth, and his Law which is the New Testament and the old law which are the divine laws, were given only for peace here and elsewhere. And Weston cited St. Augustine, who says, *et concordia stat et augetur respublica et discordia ruit et diminuitur*. And Catline said that Peace is described in this manner, *Pax, mater alma opulentiae, vehitur curru; currus, ubi pax vehitur, dicitur unanimitas; auriga, qui currum regit, dicitur amor; duo equi currum trahentes sunt concordia et utilitas; comites pacis sunt justitia, veritas, diligentia, industria, omnium artium parendarum*."

Glanvil was cited by Catline, J., "A Judge of this Realm a long time ago for he died in the Time of King Richard 1 at the City of Aires in the Borders of Juey (i.e. Jewry) attending upon King Richard in his voyage to that Place." Bracton also is quoted at some length.

Stowel v. Lord Zouch, (1564) 1 Plow. 353, 357, 368, 369.

⁴ Glanvil's great work, *De Legibus et Consuetudinibus Angliae*, is now believed by many to have been written by his nephew and secretary Hubert Walter, afterwards Archbishop of Canterbury, Chancellor and Justiciar. 2 Holdsworth, op. cit., 189. The passage referred to is Lib. 8. c. 1: the author adds "*Contingit autem aliquando loquelas motas in Curia domini Regis per amicabilem compositionem et finalem concordiam terminari, sed ex licentia Regis vel ejus justiciarorum*"—but this is certainly too narrow.

See Bracton, *De Legibus et Consuetudinibus Angliae*, Lib. 5, Tit. 5, c. 28—he adds: "*Finis est extremitas unius cujusque rei hoc est idem in quo unaquaque res terminatur, et ideo finalis concordia quia imponit finem litibus*."

The well known legal maxim, *Interest republicae ut sit finis litium*, was frequently invoked in olden times. cf. 2 Blackstone, Commentaries on the Laws of England 349, 350.

The Fine was a conveyance of land in the presence of the court—the court might be the King or his justices either at Westminster or itinerant, the bishop in his court, the comitatus or county court—indeed any court of record.⁶

After the Statute de Modo levandi Fines which forbade "a final Accord to be levied in the King's Court without a Writ Original," the Fine was in form the compromise of an action; but before that statute this was not always the case. For example, we find in Easter Term, 2 John (1201) a Record in Curia Regis in a Cambridgeshire case in which Philip de Sumeri defends an action concerning the third part of a knight's fee by setting up "cartam quandam Hugonis Archeri, in qua continetur quod idem Hugo . . . illam vendidit et quietam clamavit Philippo de Sumeri et heredibus suis totum jus quod habuit in ea pro x. solidis et j. pallio viridi in curia Rogeri de Sumeri . . . et Philippus interrogatus utrum illa finis facta esset per breve regis vel justiciariorum dicebat quod non fuit lis inter eos per aliquod breve sed per voluntatem utriusque"—a certain grant of Hugh Archer (the plaintiff) in which it is contained that the said Hugh sold it and quitted claim to Philip de Sumeri and his heirs all the right which he had in it for ten shillings and one green cloak in the Court of Roger de Sumeri . . . and Philip being asked whether that Fine was made by Writ of the King or the Justices said that there was no litigation between them by any Writ but (the Fine) was by mutual agreement.⁷

It is possible that this Fine might not be held valid, as we find the further entry. "Concordati sunt"—they settled; and further: "Dies datus est Philippo de Sumeri et Hugoni Archeri de placito recipiendi cirographum⁸ suum a die Pasche⁹ in v septimanas.

⁶Some consider that this so-called Statute was not in reality a Statute but rather a Rule of Court. Pollock and Maitland, *op. cit.*, p., p. 94, n. 3, referring also to the Statute de Finibus Levatis, 27 Edward 1, *Ibid.*, p. 98, n. 6, "It is to be distinguished from the unquestionable Statute de Finibus Levatis of 27 Edw. 1." Whatever it was, it was considered to have the force of a statute and I do not depart from the traditional terminology.

⁷See any of the old law writers.

⁸1 Curia Regis Rolls of the Reigns of Richard 1 and John 447, 448. It will be seen that this Fine was not "Sur cognizance de droit, come ceo que il ad de son done," the usual form in later days; but "Sur concessit." 2 Blackstone, Commentaries 352, 353.

⁹1 Curia Regis Rolls 253. "cirographum" or "cyrographum" (literally "handwriting") was the technical term, generally employed for the deed in a Fine. The terminology "levying a Fine" always employed in later times does not seem to have yet been adopted—a "Finis" is always "facta," made, never "levata," levied; and the cognizee has a day "habendi (or ad recipendum) cirographum suum" not "levandi, &c."

Philippus de Sumeri ponit loco suo Ricardum Capellanum ad recipiendum cirographum suum . . ."—a day is given to Philip de Sumeri and Hugh Archer in their action to receive their chirograph, five weeks after Easter. Philip de Sumeri appoints Richard Chaplain his attorney to receive his chirograph.¹⁰

But of a record in Trinity Term, 2 John, (1200), there can be no doubt:

"Oxon.' Baking.'—Hec¹¹ est convencio facta inter Radulfum Hareng' et Willelmum de Weberi et coram G. filio Petri capitali justiciario et Simone de Pateshull' et Ricardo Heriet et sociis eorum de tenementis subscriptis, unde tamen placitum non fuit in curia regis coram eis, scilicet quod predictus Willelmus concessit eidem Radulfo . . . Omnia hec¹² predicta tenementa predictus Willelmus et heredes sui warrantizabunt predicto Radulfo et heredibus suis [et] totum jus et clamium quod habet in terris et in feudis que¹³ aliquis ei deforciat in Anglia."

Oxford, Buckingham. This is the agreement made between Ralph Hareng and William de Veber and before Geoffrey Fitz-Peter, Chief Justiciar, and Simon Pateshull and Richard Heriet and their associates concerning the tenements hereunder written in respect of which there was no plea in the Curia Regis before them, that is to say, that the said William grants to the said Ralph (here follows the agreement which I do not translate in full—in substance, de Veber grants to Hareng, his Manor, the "homagium" of certain named persons and their heirs and certain services "in wood and field, in meadows and pastures, in meres and mills . . ." for a rental of ten marks—£6.13.4—yearly, five payable at Easter and five at Michaelmas—a Fine "sur concessit"). All the said tenements the said William and his heirs will warrant to the said Ralph and his heirs (and) the right and claim which he has in the lands and fees which anyone in England may deforce him of.¹⁴

Pollock and Maitland's explanation of the expression, "levying a Fine" is ingenious: "It may take us back to the Frankish *levatio chartae*, the ceremonial lifting of a parchment from the ground . . ." 2 Pollock and Maitland, *op. cit.* 98. "Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the earth and thence it is solemnly lifted up or 'levied' (*levatio cartae*): Englishmen in later days know how to 'levy a fine.'" Ibid, 85.

¹⁰In these MSS., our diphthong "æ" is written "e", e.g., Pasche for Paschæ. Hec for Hæc, que for quæ, concordie facte et concessæ for concordie factæ et concessæ.

¹¹Curia Regis Rolls 183.

¹²See note 9. ¹³See note 9.

¹⁴Curia Regis Rolls 74. Then "for this gift and concession," Ralph acquies William against Annora de Sancto Walterico, 100 marks.

Even at this time generally and, as we have seen, later always, in order to levy a Fine there was an action at law, very commonly though not always a collusive action. The authorities say that the usual writ was a Writ of Covenant alleging a covenant by the vendor of the land to sell it to the purchaser, although a Writ of Mesne, of Warrantia Chartae, de Consuetudinibus et Servitiis, &c, might be employed. No doubt, the Writ of Covenant was the usual writ when the action had become collusive and the Fine a mere method of conveyancing; but in earlier times, I find the Writ of Novel Disseisin, of Mort d'Ancestor, of Right, &c., all employed—and the rule came to be recognized that any original writ would answer.

The Fine might be made before the King himself generally with some of his Justices. E.g. in Hilary Term, 2 John, (1201), a Fine is set up which had been made "in curia domini regis apud Marleberge coram domino rege H. patre Rannulfo de Glanvill' Willelmo Ruffo justiciariis"—in the Court of our Lord the King at Marlbridge before our Lord King Henry II, father (of the present King), Ranulph de Glanville and William Ruffus, Justices.

Generally the King is absent and the Fine is "coram Justiciariis" either "apud Westmonasterium" or "iterantibus." Other Courts had jurisdiction: e.g., in Hilary Term, 10 Richard II. (1199) we find—

"Glouc' Dies datus est abbati de Cirencestr' et Barlet de placito concordie facte et concesses¹⁵ coram H. Cantuariensi archiepiscopo a die Pasche¹⁶ in xv dies ut per archiepiscopum sciatur forma concordie"¹⁷. Gloucestershire—A day is given to the Abbot of Cirencester and Barlet (or Barbet) concerning a plea of a Fine made and granted before Henry Archbishop of Canterbury on the Quindene of Easter that it may be known from the Archbishop what is the form of the Fine."

Sometimes the King intervened personally, and forbade a Fine to be levied. In a long Record in Eastern Term, 2 John, (1201), we have an instance of royal interference¹⁸: In a Sussex

(The next entry is about a kinswoman of mine, Sibyl Ridel, who had lost her land "in manum regis" and wanted it back. There is a story about Sibyl, "but that is another story").

¹⁵See note 6.

¹⁶See note 9.

¹⁷See note 14. "Barlet" is properly "Barbet" (Barbectus).

¹⁸It was such interferences that led to the famous chapter xxix of Magna Carta: "... Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam." It will be seen that King John was not the first

case a complaint is made by certain men of Prunhulle (now Broomhill) that the Abbot of Battle (de Bello) and the Abbot of Robertsbridge (de Ponte Roberti) made a Fine in the Curia Regis in the time of Henry II, of a certain fen belonging to the men: they offer a fee to the King to have the matter inquired into by a jury. The Abbot of Battle comes and says that he recovered the land from the Abbot of Robertsbridge on a writ of Novel Disseisin, that the latter then brought a Writ of Right and then they made a Fine—the Abbot of Robertsbridge agreed in this. The men of Prunhulle in addition to a plea on the merits, “*adicunt etiam quod Steffanus de Turnham tulit domino G. filio Petri breve regis, in quo continebatur quod finis non fieret inter eosdem abbates si esset ad nocumentum hominum de Prunhull; et inde voca(n)t ipsum dominum G. ad warantum*—also said that Stephen de Turnham¹⁹ bore to my Lord Geoffrey Fitz-Peter (Chief Justiciar) the King’s Writ in which it was contained that there should be no Fine between these Abbots to the injury of the men of Prunhulle, and therein they vouch the said Lord Geoffrey to warranty. Not having this prohibitory writ in court they could not proceed—and they were not content to rely solely on it but desired to prove their plea that the Assize on the Writ of Right did not cover this fen but only a certain property called Frith, and that the Abbot of Battle the defendant did not justly occupy the fen of some fifty acres. Accordingly they paid five marks (£3.16.8) to the King for an enlargement to the Quindene of Michaelmas.²⁰

Of course a fee had to be paid to the King for the Writ to begin the action—this fee called the Primer Fine (Premier or Pre-

to send prohibitory Writs to the Judges. The Record quoted is in 1 Curia Regis Rolls 467.

¹⁹See 1 Curia Regis Rolls 467. From other entries, it appears that Stephen de Turnham or de Thorneham was one of the Justices: 1 Curia Regis Rolls 72.

²⁰The story is completed in 2 Curia Regis Rolls 102, 237, 312. In Michaelmas Term, 4 John, (1202), a Great Assize was called to determine whether the Abbot of Battle was seized in his domain of the whole fen between Swanemere and Lachene (now Chene) belonging to the Manor of Prunhulle—this was enlarged to three weeks after St. Hilary’s day. In Easter Term 4 John (1203), they agreed, and a day was given “*hominibus de Prumhill*” per atornatos suos et Johanni abbati de Bello ad capiendum cirographum in iij septimanas post festum sancte Trinitatis—to the men of Broomhill by their attorneys and to John, Abbot of Battle, to receive their chirograph, three weeks after the Feast of the Holy Trinity. This was again enlarged, Trinity Term, 5 John, (1203) to a month after Michaelmas.

It will be seen that the men of Broomhill and the Abbot of Battle levied a Fine.

fine) was in Blackstone's time one-tenth of the annual value of the land.²¹

Then the parties pretended to agree on terms of settlement—the concordia. As much of the royal revenue in olden times was derived from the Courts, and a litigant who failed was "in misericordia," in mercy and was liable to pay a fine to the King²² he would lose money if an action were settled—consequently it was but just to the King that he should receive a fee for consenting to a settlement of the action. Cases were known in which a litigant withdrawing or settling without the leave of the King or his justices was fined or imprisoned.²³

Accordingly when the consent of the King's Justices was obtained, the King became entitled to another fee, the Post Fine, often called the King's Silver, which in Blackstone's time was three-twentieths or 15% of the actual value of the land. This consent was generally called *licentia concordandi* and made the agreement effective.

Then came at least in later times, for I find no trace of it in the times of Richard I and John, the note of the Fine, an abstract of the Writ and the Agreement. A Statute of 1403, 15 Henry IV, c. 14, reciting that many Feet of Fines were in the treasury and the notes in the Common Bench, directed that the notes should be inrolled and remain in the custody of the chief clerk of the Common Bench.

Then the fifth step—the Foot of the Fine including the whole matter. This, from July 15, 1195, when Hubert Walter devised the form of engrossing Fines,²⁴ was written in triplicate by the

²¹Sellon, *The Practice of the Courts of King's Bench and Common Pleas*, 2d ed. gives a sufficiently full account of the practice. William Cruise's more elaborate work, *An Essay on the Nature and Operation of Fines and Recoveries*, 2d ed., may also be consulted (I have placed a copy in the Riddell Canadian Library at Osgoode Hall. See Note 45 *infra*.)

²²In some cases the fine might be remitted for special circumstances, e.g., the poverty, or nonage of the suitor.

²³E.g. in Hilary Term, 2 John, (1201), 1 *Curia Regis Rolls* 411. "Cantebr.—Johannes de Wasingel' venit in curiam et quietos clamavit Ricardum de Wasingel' et Widonem de Fukeswrthe et Rogerum Malartes de morte patris sui, unde fecerat eos attachiari et retraxit se. Et preceptum est quod habat breve ad vicecomitae quod ipse et plegii ejus sint quieti et ut capiat corpus Johannis et mittat eum in gaoliam"—Cambridgeshire—John of Wasingale came into Court and acquitted Richard of Wasingale and Guy of Folksworth and Roger Malartes of the death of his father whereof he had had them attached and withdrew. And it was ordered that he (Richard) should have a writ to the sheriff releasing him and his bondsmen and that he (the sheriff) should take the body of said John and put him in gaol.

chirographer of the Court of Common Bench—which court had a monopoly of Fines after the differentiation following Magna Carta. Each of the parties, Conusee (plaintiff, purchaser) and Conusor (defendant, vendor) received a copy of the chirograph and the third, the real Foot of the Fine, was kept in the royal treasury.²⁵ An unbroken series of Feet of Fines there remains from 1195 till the abolition of Fines in 1834 by the Act, 3, 4, William IV, c. 74.

A day was given to the parties in early times to come into Court for their copy,²⁶ and they had to take it up or be “in mercy.”

In the case of a married woman’s land, she was examined apart by the justices as to her consent; and one of the main advantages of the Fine was that thus a married woman was allowed effectively to dispose of her land by joining with her husband in levying a Fine—she could not thereafter, when her husband died sue out a Writ of Cui in Vita.

Other advantages are detailed by Blackstone and the common law writers: but so far as I can find, the Fine was used on this Continent only to convey the lands of married women—and by that time the practice had become purely formal and collusive and at the same time very expensive.²⁷

In the North American Colonies afterwards the United States, the Fine seems to have been little used—and when used, only for the purpose of conveying the lands of married women.

In one Colony, New York, notwithstanding certain remarks in one of the cases cited below, it was in use beyond question; in another, Massachusetts, it is authoritatively stated that it was not—in some others, it seems to be doubtful.

It may be well to look at the decisions:

In *Clay v. White*,²⁸ Mr. Justice Roane says: “a fine . . . would be . . . effectual were it not obsolete in this country.”

²⁴2 Holdsworth, *A History of English Law* 184. In vol. 3, pp. 223, sec., of this excellent work a very accurate and admirable account is given of Fines.

²⁵In Trinity Term, 2 John, (1200), I find in a Norfolk case, William Chaplain, attorney for Roger of Brandon claiming half the advowson of the Church at Brandon under a Fine made before the Justices Itinerant, “et pedem cirographi . . . est in thesauro.” 1 Curia Regis Rolls 208.

²⁶For example in Trinity Term, 2 John (1200), 1 Curia Regis Rolls 197, a day is given one month after Michaelmas to the parties (named) “de recipiendo cirographo suo.” “Et Eborardus habet notam, quam Galfridus Clericus de Tademerton’ scripsit”—and Everard has the note which Geoffrey, the Clerk of Tademerton (in Oxfordshire) wrote.

²⁷Sellon, *op. cit.*, p. 477, says that in order to complete a Fine “they must pass through the several following offices . . . viz: the Alienation

In *Knight v. Lawrence*,²⁹ after stating that, "By the ancient common law the method of conveying a married woman's lands was for her to unite with her husband in levying a Fine," the court by Mr. Justice Elliot said, that³⁰ "the common law methods are practically obsolete in Colorado at the present time."

In *Woodbourne v. Borrel*,³¹ the court refrained from expressing an opinion as to the Fine before the Revised Statutes of 1751.

In Maryland the Fine seems to have been in use before the Act of 1751.³²

In Massachusetts, it is positively stated by Chief Justice Parsons in *Fowler v. Shearer*,³³ that estates had never been conveyed by a Fine there. Chief Justice Taylor in *Jackson v. Gilchrist*³⁴ says speaking of the Fine:

"It may, however, I think, be assumed that in point of fact and as a matter of practice, the common law in this respect has never been adopted with us: and it may not be amiss briefly to observe that in some of our sister states which were British Colonies and, equally with us subject to the common law, the mode of acknowledgment adopted in this case has been substantially recognized and sanctioned."

Then he says:

"I have barely referred to some cases that have arisen in other states . . . to show that the common law mode of conveyance by Fine was not in practice there, nor, most likely in any of the British American colonies."

I find some difficulty in understanding this judgment in view of other New York cases. *Rosebloom v. VanVechten*³⁵ speaks of the Fine being provided for by an Act of 1808 and the Revised Laws of 1813—an Act of 1828 repealed the former legislation from and after the end of 1829.

In *Jackson ex dem. Watson v. Smith*,³⁶ a Fine sur cognizance de droit come ceo que il ad de son done levied in 1805 was under consideration—it was held valid: In *Jackson v. Gilchrist*,³⁷ the

office, the Return office, the Warrant of attorney office, the Custos Brevium office, the King's Silver office and the Chirographer's office.

²⁸(1810) 1 Mun. (Va.) 162, 173.

²⁹(1894) 19 Colo. 425, 435, 36 Pac. 242.

³⁰(1894) 19 Colo. 425, 436, 36 Pac. 242.

³¹(1872) 66 N. C. 82.

³²*Nicholson's Lessee v. Hemsley*, (1796) 3 Md. 409; with this accords *Hitz v. Jenks*, (1887) 123 U. S. 297, 8 Sup. Ct. 143, 31 L. Ed. 156.

³³(1810) 7 Mass. 20.

³⁴(1818) 15 John. (N.Y.) 89, 109.

³⁵(1845) 5 Den. (N.Y.) 414.

³⁶(1816) 13 John. (N.Y.) 426.

³⁷(1818) 15 John. (N.Y.) 89.

question was raised whether before the Act of 1771 a married woman could convey her real estate except by a Fine. In *Albany Fire Insurance Co. v. Bay*,³⁸ Mr. Justice Jewett points out: "By our usages and laws we have substituted her deed for a conveyance of lands in the place of the common law mode for Fine."

In *McGregor v. Comstock*,³⁹ there was under consideration a Fine levied in 1827: it was held good after a learned and elaborate discussion.

The Supreme Court of the United States in *Hitz v. Jenks*⁴⁰ states that from 1715, in Maryland, "the conveyance of the estates of married women by deed with separate examination and acknowledgment has taken the place of the alienation of such estates by Fine in a court of record under the law of England."

In *First National Bank v. Roberts*,⁴¹ is an elaborate discussion of the Fine which is called "the prototype of the more modern method prescribed by Statute," but the discussion is not helpful in the present inquiry.

Nothing of a more definite character seems available as to the prevalence of the Fine in the thirteen colonies.

In Pennsylvania as early as 1706, we find legislation which provides,^{41a} "that from henceforth no woman shall be debarred of her right . . . in any lands . . . in her own right . . . sold aliened or conveyed by her husband during coverture unless she be party to such deeds . . . and be examined secretly and apart by the justice or justices . . . whether she be content of her own free will to part with her right . . ." and the justice or justices might examine as to her age. This act was disallowed by the Queen in Council, and a more comprehensive one chapter clxx, passed in February 1711 was also disallowed—I do not trace the subsequent legislation.

Coming further north into what is now Canada, I find no trace of the Fine in Nova Scotia, New Brunswick or Prince Edward Island.

In Quebec except for the short time between the Royal Proclamation of 1763 and the Quebec Act of 1774, the French Civil law prevailed which knew not the Fine.

In the territory which became the Province of Upper Canada, the French Civil law was in force in December, 1791 when

³⁸(1850) 4 Comst. (N.Y.) 9.

³⁹(1858) 17 N. Y. 162.

⁴⁰(1887) 123 U. S. 297, 301, 8 Sup. Ct. 143, 31 L. Ed. 156.

⁴¹(1890) 9 Mont. 323.

^{41a} Pa. St. at L. c. 135 sec. 3.

the new Province began its separate career and until the passage in September 1792 of the Act, 32 George III, c. 1 (U.C.) which by section 3 introduced the Laws of England in all matters of property and civil rights.

The Province was divided into four districts each with a Court of Common Pleas with full civil jurisdiction: the records of all these courts are extant⁴² and no reference to a Fine being levied is to be found therein.

But in 1794, these courts were abolished and a Court of King's Bench instituted⁴³ with all the jurisdiction of the Courts of King's Bench, Common Bench and (as to revenue) Exchequer in England.

The Term Books of this Court which lasted till 1881 are extant: and there are to be found entries of passing Fines by married women.

In Easter Term 39 George III, Friday, April 12, 1799, the entry appears in the Term Book. Present, Elmsley, C. J., and Powell and Allcock, JJ.

"Mrs. Elmsley⁴⁴ appeared in court to pass a Fine."

In Michaelmas Term, 42 George III, Wednesday, November 11, 1801, before Elmsley, C. J., and Powell, J.

"William Jarvis, Esquire, and his wife Hannah, came into Court and suffered a Fine and Recovery, etc. to R. I. D. Gray, Esquire."⁴⁵

⁴²Reprinted in 14 Ontario Archives Reports, (1917) pp. 25 sqq: The Records of the Court of Common Pleas for the District of Hesse including Detroit are also to be found reprinted with notes in my Michigan Under British Rule, 1760-1796, Michigan Historical Commission, Lansing, 1926.

⁴³By the Act (1794) 34 George III, c. 2 (U.C.)

⁴⁴Mrs. Elmsley was the wife of the chief justice (Term Book p. 80)—they were both English and he had been a member of the English Bar.

⁴⁵William Jarvis was our first Provincial Secretary; his wife Hannah was born in Hebron, Connecticut, the daughter of the Revd. Samuel Peters, a Loyalist, who went to England on the outbreak of the Revolution. Robert Issac Dey Gray, was the son of Major James Gray, a Loyalist: the son received a License to practise Law under the Act of 1794 and in 1797 became our first Solicitor General. He was drowned in the "Speedy" disaster in October, 1804.

It may be of interest to note that my copy of Cruise—See Note 21, *supra*, was once the property of Gray—it contains on the fly leaf the following in the Solicitor-General's handwriting: "Purchased of Mr. White's auction, 15th April, 1800, 12s6d. Robt. I. D. Gray." "Mr. White" was John White, an English Barrister, our first Attorney General, 1792-1800: he was killed in a duel by John Small, January 4, 1800: the Law Society of Upper Canada desired to purchase his library but for some reason failed (probably *res angusta domi*), and Hon Peter Russell, White's executor sold the books by auction, April 11, 15—William Cooper whom we shall meet again being auctioneer. See my Legal Profession in

There were others but the passing of them was not recorded in the Term Books: and the parties were not quite content with any of them.

The matter came up in the Provincial Parliament.

On Monday, February 7, 1803, in the Legislative Council, almost immediately after passing the Address, Hon. James Baby, formerly of Detroit, brought in a Bill "to enable married women having real estate more conveniently to alien and convey the same." It was read that day; February 12, it was considered in Committee of the Whole, the attention of the committee was called to the Fines levied in the Court of King's Bench without all the formalities required by the practice and it was determined to validate them by legislation. Accordingly, the Bill was amended in committee so as also "to confirm and declare valid four several Fines heretofore levied or intended to have been levied in the Court of King's Bench in this Province." It passed its third Reading, February 14, and was engrossed and sent down to the Legislative Assembly. The Houses were at odds over an alleged contempt of the Assembly by David Burns, Master in Chancery in the Council, but Robert Isaac Dey Gray, the Solicitor General who was a Member of the Assembly succeeded in persuading that House to proceed with the business of the Session. February 17, the Bill went to Committee of the Whole: the next day there was no quorum but, February 22, it was reported with amendments, next day engrossed and sent up to the Council. The Council requested a Conference which was agreed to: the Assembly Conferencees⁴⁶ insisted on dropping the part of the Bill validating the Fines but withdrew all other objections: the Council agreed and the Bill was passed in that form.

The solicitor general was personally interested and there was no real objection to the measure: he accordingly on Tuesday, March 1, brought in a Petition on behalf of himself and four others to validate "four several Fines" which he "together with (Chief Justice) the Honorable John Elmsley and William Cooper had been concerned in levying . . . in the Court of King's

Upper Canada, &c., Toronto, 1916, pp. 84, 151-153. The volume was afterwards the property of Clarke Gamble, K. C., and was given me by his son, H. D. Gamble, K. C., of the Toronto Bar.

⁴⁶The conferees from the Assembly were Sheriff Macdonell, Isaac Swayze, E. Washburn, Robert Nelles, Angus Macdonell and Robert Isaac Dey Gray, Solicitor General, the two last-named being lawyers: William Hamilton and Richard Cartwright who though laymen had both been Judges of the Court of Common Pleas represented the Council.

Bench in this Province . . . being advised that the said Fines are not legal on account of the want of the necessary officers to carry through the same."

He introduced a Bill, seconded by Ralfe Clench of Niagara which passed all its Readings the same day—sent up to the Council, it there passed all its Readings that same day—and but required the Royal Assent to become law. But this was the one Bill of the Session to which His Excellency, General Peter Hunter, the Lieutenant-Governor of Upper Canada, on March 5 "was pleased to withhold his Assent to."⁴⁷

Hunter was not a lawyer: in none of his despatches to the secretary of state is any information given of his reason for refusing the Royal Assent⁴⁸: it was believed at the time to be due to the advice of Chief Justice Allcock—his reason has not come down to us.⁴⁹ However, in those days the governor actually governed: he had not yet become *lucus a non lucendo*, he had some say in legislation and was responsible to no one but the King and the Ministry at Westminster. Nothing could be done and the attempt was not again made—the defective Fines were replaced by valid conveyances under the Act now to be mentioned.

The "Act to enable Married Women having Real Estate more conveniently to Alien and Convey the Same" was assented to after being denuded of the provisions validating the Fines—and the Fine was never again resorted to.

This act⁵⁰ provided for the examination of the married women in open Court before the Court of King's Bench or any judge in chambers or at an Assize as to her consent, following closely the legislation in some of the American Colonies. There continued to be an examination of the married woman grantor in this Province until 1873 when the Legislature having got over the idea that the wife is the weaker vessel killed it⁵¹ after a life of three score and ten years.

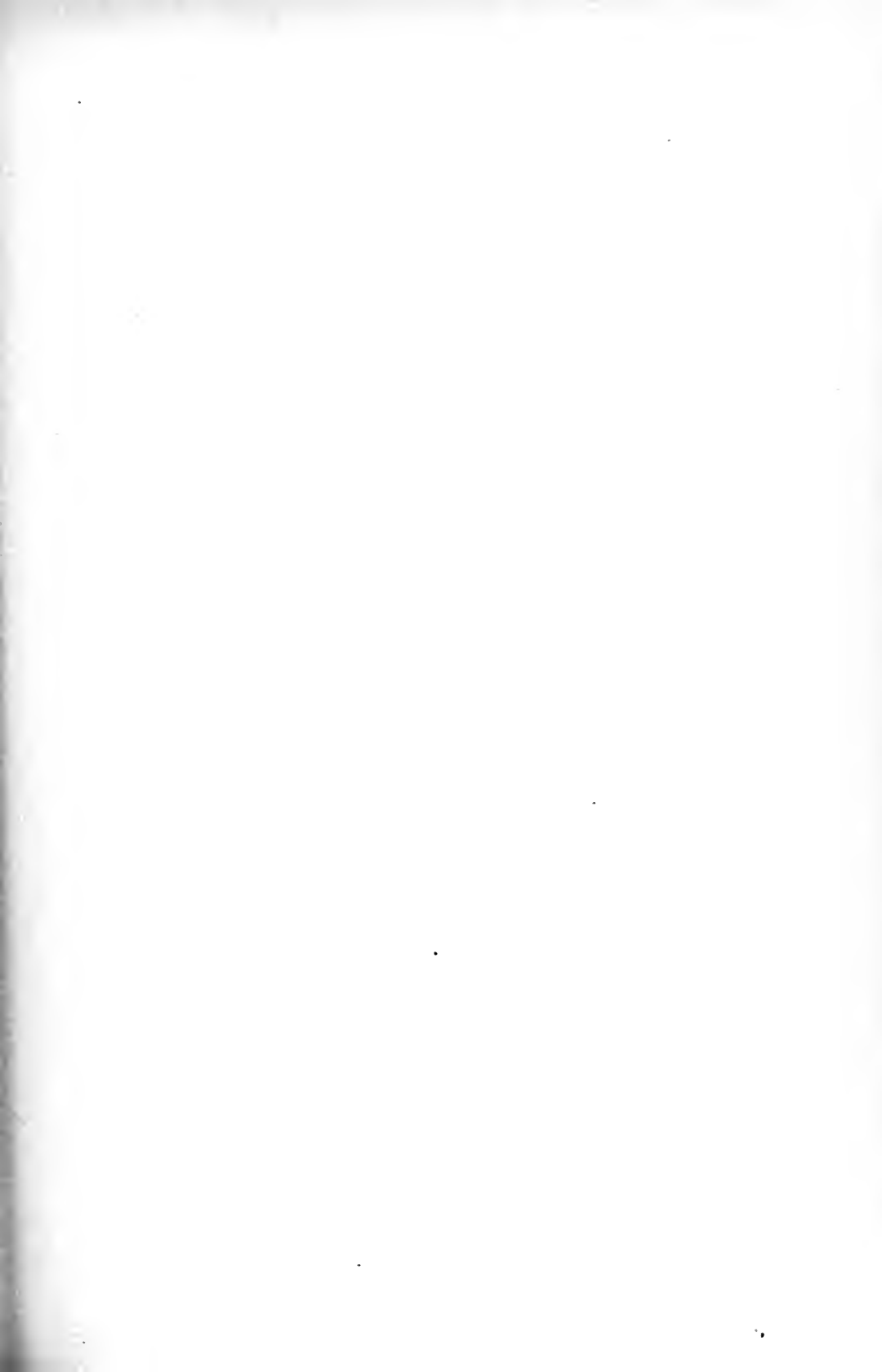
⁴⁷For the proceedings in the Legislative Council see 7 Ontario Archives Reports (1910) pp. 179, 184, 185, 190, 191, 192, 198: in the Legislative Assembly, see 6 Ontario Archives Reports (1909), pp. 355, 360, 363, 364, 369, 372, 373, 374, 375, 383, 409.

⁴⁸Canadian Archives, Q. 244, pp. 43, 49, 66, 140.

⁴⁹There is a hint in one contemporary letter that Allcock had a grudge against Gray: another suggests a feeling against the Elmsleys—but all that is gossip, more or less malicious.

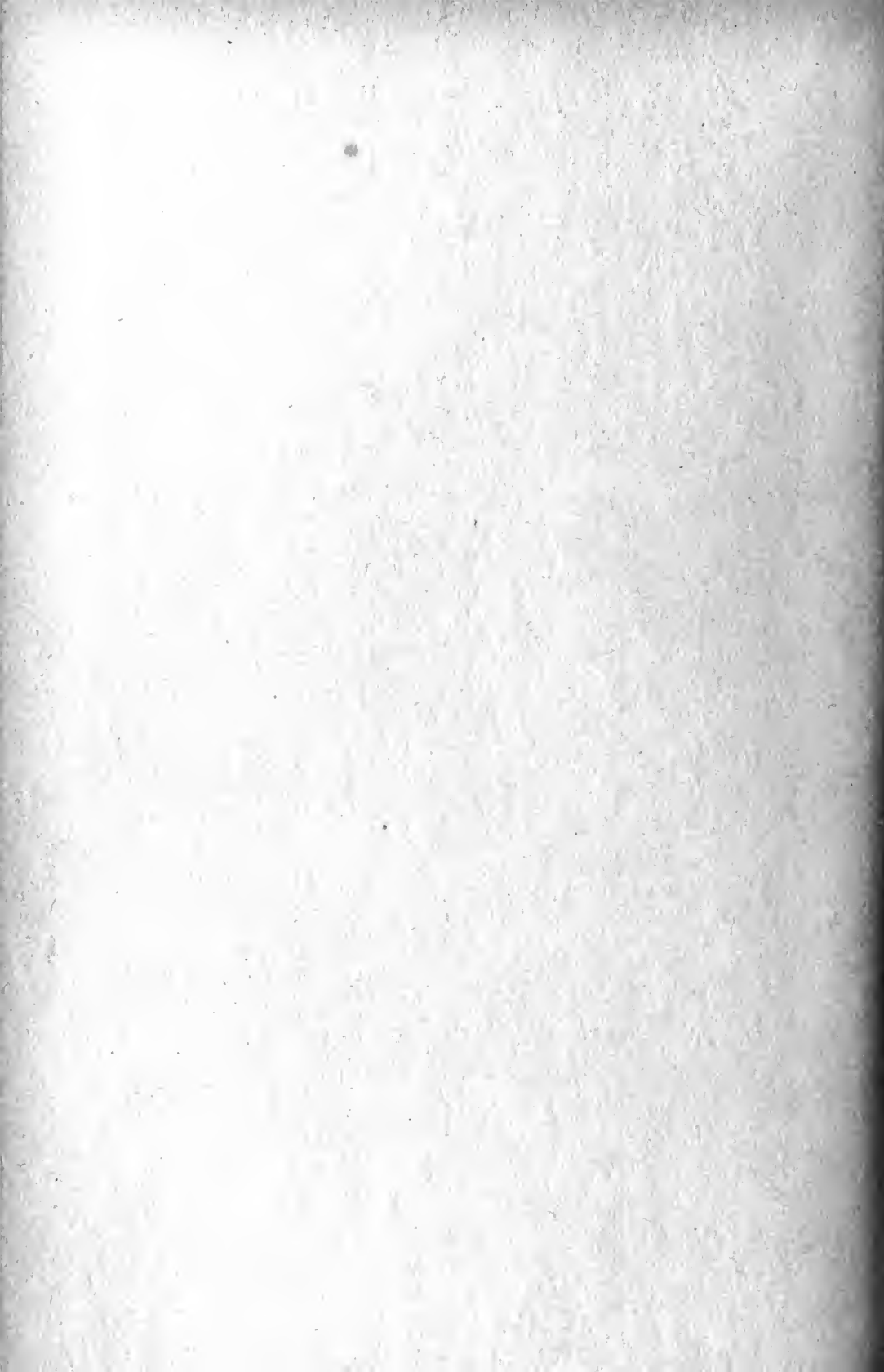
⁵⁰(1803) 43 George III. c. 5. (U.C.)

⁵¹Ontario Statutes (1873) 36 Vict., c. 19, (Ont.).



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qu'il allait remplir, puisqu'il combinait en sa personne les plus profondes connaissances légales et l'expérience politique la plus étendue.

La Cour Suprême ne siégea pas immédiatement cependant dans le petit édifice de l'encoignure de l'ouest. Elle occupa d'abord la salle du comité des chemins de fer, au Parlement. En attendant, sa future demeure servait d'atelier au Département des Travaux Publics. Elle ne perdit pas, en changeant de but, son caractère industriel. Quand on pénètre à l'intérieur, par la porte réservée aux juges (mais dont tout le monde se sert), on arrive au premier étage par un escalier en bois craquelant qui mène à un long corridor vieux et nu, de chaque côté duquel s'ouvrent des loges de bénédictins. Là vivent ensemble les six juges de la Cour Suprême, près d'une bibliothèque où fraternisent tous les livres du droit anglais avec tous les livres du droit français. Ils étudient; ils échangent leurs vues; ils discutent; ils confèrent. Le contact des lois différentes entraîne les plus minutieuses et les plus prudentes explications, les illumine par la comparaison et par le contraste; force à en pénétrer plus profondément le sens, à le rechercher aux sources; et, en même temps qu'il amoindrit le danger des raisonnements routiniers ou des idées préconçues, il rend plus aigu le travail analytique et ouvre des aperçus et des horizons qui n'avaient pas jusqu'alors été soupçonnés. Tout les avocats du Québec qui ont plaidé devant la Cour Suprême ou le Conseil Privé ont fait cette constatation, qui provient du fait que, pour fournir une explication exacte et précise à des intelligences légales, d'ailleurs supérieurement organisées, mais qui ne sont pas familières avec nos lois, ils sont forcés eux-mêmes à consacrer à l'étude des textes une attention beaucoup plus minutieuse, et toujours susceptible d'apporter des lumières nouvelles.

(To be continued.)

WAGER OF BATTEL IN A.D. 1200.

To one who, like me, approached the study of the Common Law through the gateway of the Civil Law, the methods by which the right to land was determined in the early English law is a constant source of amazement.

From shortly after the Conquest (at the latest) until well within the reign of Henry Plantagenet the only method was the judicial duel. Henry II., with the consent of his nobles or Parliament, gave to the tenant of land which was demanded by another in the court the privilege of having the ownership determined by twelve recognitors—for this the tenant must pay a fee, *oblatum*, or *oblatio*, to the King, generally the minimum half mark or 6/8. Blackstone in his "Commentaries on the Laws of England," Book iii, pp. 337, *et seq.*, gives a reasonably full and accurate account of the practice, but by his time it had become conventionalized (and almost obsolete). The recent volume published in 1922 by His Majesty's Stationery Office, London, "Curia Regis Rolls of the reigns of Richard I. and John preserved in the Public Records Office," contains contemporary records of proceedings in Curia Regis, 1196-1201: from these records may be gathered the actual conduct of a "Wager of Battel" at that time—it must be remembered that the Curia Regis had not yet divided into permanent separate courts.

The Wager of Battel might be waged in three cases:—(1), in the Court Martial, i.e., the Court of Chivalry and Honor, (2) in Appeals of Felony, and, (3) in Writs of Right—the Curia Regis had to do with only the last two. Of the twenty cases of judicial duel mentioned in this volume, twelve are on Writ of Right and therefore civil, and eight are on Appeals of Felony, and, therefore, criminal.

While the Writ of Right could be and often was brought in the County Court or the Baron's Court, there is no mention of the Tolt to remove a plaint from Court Baron to County Court and only one or two of the Pone to remove from County Court to the King's Court. Apparently the first proceeding in cases in the Curia Regis was for the defendant to sue out his Writ of Right and have the tenant summoned by the Vice-comes, Sheriff of the County, through "good summoners" to be present before the Justices of the Court on a day named: on the day mentioned, if the demandant and tenant both appeared either in person or by attorney (1), the demandant made his claim and offered to prove it by a man whom he named or he might withdraw the claim—in the latter case he was "*in misericordia*" "*in mercy*" and paid a fine to the King, generally half a mark "*dimidium marcum*," 6/8, but sometimes more. Sometimes a litigant "*in misericordia*" escaped altogether, e.g., I find an early entry, "*Robertus in misericordia: puer est, condonatus est*"—Robert in mercy: he is a boy, he is excused."

One example of a record will suffice. In Hilary Term, 10 Ric. I. (1199), we find:—

"Bedef"—Robertus Malherbe, portans breve de nova disseisina super Simone de Bello Campo retraxit se, in misericordia. Misericordia est j marca."

"Bedford—Robert Malherbe having a writ of novel disseisin against Simon de Bello Campo (Beauchamp) withdraws, in mercy. The fine is one mark" (13/4).

If the claim was pressed, an entry such as this was made—the following is in Michaelmas Term, 2 Joh. (1200).

"Warri"—Henricus de Ermenters petit versus Gaufridum le Salvag' feodum j militis cum pertinenciis in Witton' sicut jus suum et hereditatem, sicut illud unde Ysabella de Ermenterres avia ipsius Henrici saisita fuit ut de jure et de feodo tempore Henrici Regis patris domini regis capiendo inde esplecias ad valenciam j marci argenti et plus: et hoc offert probare per Alanum de Hekinton', qui hoc offert ut de visu suo.'

(Instead of the latter expression is sometimes found "qui hoc offert disracionare per corpus suum ut de visu et auditu." . . .)

"Warwick—Henry de Ermenters demands against Geoffrey le Sauvage one military fee with appurtenances in Wooton (Leek) as his right and inheritance, as Isabella de Ermenters grandmother of the said Henry was seized of it as of right and of fee in the time of King Henry (the Second) father of our Lord the King by taking the esplees thereof to the value of one silver mark and more, and this he offers to prove by Alan of Hekinton who offers the same as by seeing. . . ." (or "who offers to prove the same by his body as by sight and hearing. . . .") Sometimes they are described as free and lawful men, "liberi et legales homines"—sometimes as the demandant's man or men, "Hominem suum," "homines suos."

The tenant not infrequently craves a view of the land: that is always granted him and the case is enlarged, generally until the Justices in Eyre come into the County—*e.g.*, in the case mentioned above "Gaufridus petit visum terre," Habeat In adventu justiciariorum et interim fiat visus" "Geoffrey craves a view of the land. Let him have it. Till the coming of the Justices and in the meantime let the view be had."

The reason for craving a view is sometimes given: *e.g.*, "quia habet inde plures terras"—"because he has several lands there"—or "quia, ut dicit plures terras habet in eodem suburbio"—"because as he says he has several lands there in the same suburb" (of Warwick).

Sometimes the parties are accorded the right to come to an agreement either on the spot or in the interim—"interim habent licenciam

concordandi"—they paying a fee of "*dimidiam marcam*" or more. If they do agree, the agreement is recorded and remains of record "*in perpetuam testimoniam*," and cannot thereafter be contradicted.

The tenant may be ready and defends—*e.g.*, Mabel de la Grave demanded against Avice of St. Quentin two hides of land "*et hoc offert probare versus illam per Radulfum de Nor' qui hoc offert disracionare per corpus suum ut de visu et auditu*"—"and this she offers to prove against her by Ralph de Norf(olk) who offers to deraign the same by his body as of sight and hearing"; but Avice is ready—"Hawisia defendit jus suum per quondam hominem suum scilicet Robertum Pistorem de Notingham vel per alium per quem debuerit"—"Avice defends her right by a certain man of hers namely Robert Miller of Nottingham or by another by whom she ought." Sometimes the form is more extended, as this by Henry of Bedefunt in Trinity Term, 1200, "*defendit totum jus suum per Willelmum liberum hominem suum vel per corpus suum proprium si de eo male contigerit*"—"defends his whole right by William his freeman or by his own body if any ill befalls William"—Blackstone, Comm. Book iii, at p. iv, app. No. 1, gives the form the proceeding ultimately took. The champions were sometimes hired "*conducticii*."

And now all is set—"Consideratum est quod duellum vadietur"—"It is considered that battel should be waged." But the champions must find pledges that they will fight—"pledges of battel" as they were afterwards called—often two in number but sometimes only one for each.

In the women's suit mentioned above, "*Plegius Radulfi*" Thomas de Terefeld: Plegius Roberti Radulfus Nicholai—"Pledge of Radph, Thomas of Terefeld: Pledge of Robert, Ralph Nicholson." If the duel is intended to be fought at Westminster a day is fixed for it by the Court and a director given, "*et tunc veniant armati*"—"and let them then appear armed."

In later years the duels were apparently always fought at Westminster: but at this time they were generally fought in the County either before the Justices in Eyre or in the County Court in presence of at least four Knights girt with their swords "*milites*"—in that case the day was not as a rule fixed by the Curia Regis.

This, the regular course, might be interrupted in several ways. The demandant might not appear in Court to make his demand—he was then "*in misericordia*" and paid a fine, unless he claimed sickness as the cause—"de malo lecti"—sending as *essoignor*—"essoniator"—to make the excuse. If this was accepted, he "essoigned himself." and a new day might be given him: if there was any doubt,

four Knights³ were generally selected by the Sheriff (by order of the Court or on a writ sued out by his opponents) to visit him and see. The inspection was sometimes not made but when the sick man got well he came to Court and asked to be allowed to appear⁴ which was allowed on paying a fee, generally half a mark: if the Knights visited him and found him sick, they generally assigned him a day, a year and a day later "in Turrini Londinensem"—"at the Tower of London," and so reported to the Court. If the tenant did not appear he might essoign himself in like manner: if he did not, his lands were taken into the hands of the King in obedience to a writ for that purpose directed to the Sheriff of the County. In Hilary Term 2 Joh. (1201) we find the following: "*Ebor*—*Preceptum fuit vicecomiti quindecimo die post festum sancti Martini quod caperet in manum domini regis ij carucatas terre cum pertinentiis in Arkeden,*' quas Robertus de Bullers et Eularia uxor ejus clamant versus Johannem de Berkun, pro ejus defecta et diem prise mandaret a die sancti Hillarii in xv die.⁵ . . ." "*York Precept was given to the Sheriff the fifteenth day after the Feast of St. Martin that he should take into the hands of our Lord the King two carucates of land with appurtenances in Arkendale (in Knaresborough, Yorkshire) which Robert de Bullers (Boulers) and Eularia (Hilaria) his wife claimed against John de Birking—for the default of the latter and notify the day of taking possession a fortnight after St. Hilary's day.*

The Sheriff would take possession and notify the Court whereupon an entry would be made in some such form as the following: "*Sussex*—*Viccomes significavit per breve sigillatum quod cepit in manum regis die Mercurii proximo ante Pentecosten, manerium de Waburtan,*' quod Olivia de Sancto Johanne clamat versus Willelmum de Portu, pro defectu Willelmi"—"*Sussex. The Sheriff signified by his sealed writ⁶ that he took into the King's hand on Wednesday next before Pentecost, the Manor of Walberton (in Sussex County) which Olivia St. John claimed against William de Portu on account of William's default.*"

The default might be explained as in this very case.

"*Sussex*—*Dies datus est Willelmo Clerico posito loco Rogeri de Munbugun et Olive uxoris sue de placito terre versus Willelmum de Portu a die sancti Michaelis in xv dies prece ejusdem Willelmi: quia ballivus Fulconis Painel, qui terram illam habet in custodia, venit et dixit quod ipse tulit literas domini regis ad justicarium⁷ quod ipse habeat pacem de omnibus terris et wardis suis. Et notandum quod terra illa capta fuit in manum regis et detenta et non petita nisi per Ballivum Fulconis*" — "*Sussex. A day was given to William the*

Clerk put in place of (*i.e.*, attorney for) Roger de Munbugun and Olive his wife in a plea of land against William de Portu a fortnight after St. Michael's day, on the prayer of the said William (the Clerk) because the bailiff of Fulk Painei who had the land in charge came and said that he (*i.e.*, de Portu) bore letters of our Lord the King to the Justiciar (Geoffrey FitzPeter) that he should have peace concerning all his lands and his wards. And it is to be noted that this land was taken into the King's hand and detained and not asked for except by the bailiff of Fulk."

If the default were satisfactorily explained, the land might be delivered up on proper claim being made by the tenant: but if the land were not claimed seisin went to the demandant.⁸

"Ebor'—Dunecanus de Lacell' pro se et Christiana uxore sua optulit se iiij die versus Philippum de Munbray et Galienam uxorem ejus de placito j carucate terr et dimidie in Latton: et ipsi non venerunt vel se essoniaverunt, et terra capta fuit in manum regis et non petita. Ideo consideratum quod ipsi habeant saisinam suam"—"York—Duncan de Lascelles for himself and his wife Christiana on the fourth day presented himself against Philip de Mowbray and his wife Gillian in a plea of carucate and a half of land in (West) Layton (in Yorkshire). and these did not appear or essoign themselves and the land was taken into the King's hand and not claimed. Therefore it is considered that they (the demandants) should have their seisin."

Sometimes a sheer mistake was made as in the case of a collateral ancestor of mine. In Trinity Term, 2 Joh. (1200) "Norht'—Sibilla Ridel petiit per plevinam terram suam de Weston die Sabbati vigilia sanctu Barnabe que⁹ capta est in manum regis sed nescitur qua de causa. . . ."—"Northampton—Sybil Ridel¹⁰ sought by plevin her land at Weston (Corby Hundred, Northamptonshire) on Saturday the Vigil of St. Barnabas which was taken in the King's hand but she knows not for what cause. . . ."

Another instance—"Kent—Dominus rex precepit per breve suum justiciariis in banco quod teneri faciant in manu domini regis terram Hugonis de Castellione que capta fuit in manu sua pro ejusdem defecti, quousque Hugo de Nevill certificaverit ipsum regem de predicto Hugone: qui dicit ipsum Hugonem die quo debuit coram illo extitisse fuisse in servicio suo"—"Kent—Our Lord the King directs the Justices by his writ that they should cause to be held in the King's hands the land of Hugh de Castellione which was taken in his hand for his (Hugh's) default until such time as Hugh de Neville should inform the King himself of the said Hugh: who says

that the said Hugh on the day he was required to be before him (the King in his Court) was active in his service."

It must not be supposed that the demandant had plain sailing in every case to get this far; there were all sorts of traps and obstacles — amongst them what came in later days to be called "dilatory pleas." For example when in 1199, Hilary Term, Ric I., Agnes daughter of Gilbert claimed of Hugh de Scalarisi, twenty acres of land in Toddeworth (*i.e.*, Tetworth, Huntingdonshire) Hugh said he should not be called on to answer "*quia ipsa habet virum qui non nominatur in brevi*"—"because she has a husband who is not named in the writ." This was, and until but the other day continued to be a perfectly valid objection. The report proceeds:—"Et quia incertum erat de viro suo utrum vivat necne, concesserunt justiciarii ut concordarent se: et concordati sunt per sic quod ipsa Angnes quietum clamavit predicto Hugonis totum jus et clamium suum quod habuit in terra illa pro j marca quam ei dedit." "And because it was uncertain about her husband whether he was alive or not, the Justices allowed them to come to an agreement—and they agreed upon this that the said Agnes called quits to Hugh aforesaid of her whole right and claim which she had in said lands for one mark which he paid her." So, too, the Templars, who claimed to own the land, were not compelled to plead until the demandant had added their tenant as a defendant.

In Trinity Term, 2 Joh. (1200). Jordan son of Avice sued Robert the son of Berta (Bertha) for one hide of land in Creeksea in Essex, claiming through his mother Avice. Robert defended and said that John's father "*nequam fuit et pro feloniam ad Assisam de Clarendon perdidit pedem et brachium et ipse genitus est de corpore nequam: et petit consideracionem curie utrum deberet ita genito de libero tenemento suo respondere. Jordanus defendit quod pater ejus nunquam ita perdidit membra sicut nequam*"—"was worthless and for felony at the Assize of Clarendon (1164) lost his foot and arm and he himself (Jordan) was born of a worthless body, and he (Robert) asked the judgment of the Court whether he was called upon to answer concerning his free tenement to one so born. Jordan denied that his father ever thus lost his members as worthless." Robert put himself upon a jury of the vicinage and a day was given. The final result does not appear but a subsequent day for hearing judgment was set.

The writ may be objected to—in Michaelmas Term. 2 Joh. (1200). "*Norþ* Rogerius filius Turstani recedit sine die versus Odonem filium Galfridi de placito v acrarum terre cum pertinenciis

in Vitton' quia non habuit breve suum de recto"—"Norfolk, Roger son of Thurstan went without a day against Odo son of Geoffrey in a plea of five acres with appurtenances in Witton because he had not his writ of right." So in a case in Hilary Term, 10 Ric. I (1199), John, son of Ralph, sued by a wrong writ: the Court dismissed the action but "Johannes placitet per breve de recto si voluerit"—"Let John sue by writ of right if he wishes." A valid plea to a writ was the illegitimacy of the demandant: if that plea was raised it was referred to the Court of the Bishop. *E.g.*, in a case in Trinity Term, 2 Joh. (1200), it is recorded that Thomas of Melton carried his writ of right before the Justices in Eyre at Thetford in Norfolk against William the Parson and William charged Thomas with bastardy "unde ipse tulit breve ad episcopum Norwicensem ad inquirendum utrum legitime fuit natus vel non"—"whereupon he took a writ to the Bishop of Norwich to enquire whether he was legitimate or not."¹¹

It is now time to speak of the actual combat: Blackstone, Commentaries, Bk. iii, p. 339, gives a description of the proceedings when the duel was fought at Westminster in presence of the Judges of the Court of Common Pleas; and *mutatis mutandis*, much of the description applies to a duel fought before Justices in Eyre or in the County.

The parties did not themselves fight—the reason alleged is that if either should be killed the action would abate—each party had a champion "campio," and they came to the field "armati," armed with a club, "baculum," an ell long and a four cornered leathern target. They were dressed in a coat of armor with red sandals, bare-headed and bare to knees and elbows. A field was prepared for the duel by the Sheriff or his deputies who selected four knights as "custodes campi," guardians of the field—the field was about sixty feet square enclosed with a stand at one end for the Justices—in Westminster there was also a bar for the Serjeants-at-Law. Each champion taking the hand of the other swore to the justice of his cause and also took an oath against sorcery, witchcraft and enchantment. The battle was to continue until one champion killed the other, which rarely happened, or one proved "recreant" and pronounced the word "craven"; or if neither of these events happened then until the stars appeared in the evening—in case of a drawn battle, the tenant succeeded—*polior est conditio defendentis*.

The Justices in Eyre, Sheriff and Knights reported the result to the Curia Regis and an entry was made of record—it was also of record in the County Court if there fought—this would be *res adjudicata* and bar all subsequent actions by estoppel by matter of record.

There are fairly full accounts of two of such duels in the recent

volume—both being of considerable interest. In Hilary Term, 10 Ric. I (1199) we find “Wilt’—Philippus de Bristo appellat Robertum Bloc quod, cum esset in duello suo et pugnaret pro quadam terram domini sui Willelmi de Ponte des Arch’ in comitatu Wiltes’ et prostravisset socium suum, venit idem Robertus et nequiter et in pace domini regis abstulit ei arma sua et ei plagam fecit in capite cum baculo camponis¹² prostrati: et hoc offert diracionare versus eum consideratione curie: et Robertus et omnes milites defendunt totum de verbo in verbum et dicunt quod interfuerunt duello sicut illi qui campum custodierunt per preceptum Ade Clerici, qui fuit ibi loco vicecomitis, et quod nullam injuriam ibi fecerunt; et inde ponunt se super eundem Adam et super recordum comitatus et petunt quod eis allocetus quod omnes campiones conducticii sunt et quod cum duellum percussum fuit, tunc nullum fecerunt querimoniam nec in comitatu nec alibi. Consideratum est quod vicecomes et recordum comitatus summoneantur quod sint a die Pasche in j mensem apud Westmonasteruim ad faciendum inde recordum.

Alexander de Lond’ appellat Willelum de Percide vi illa.

Johannes Hereward’ appellat Hugonem de Drueis et Robertum de Mara de vi illa.

Rogerus Waiffe appellat Willelum de Cotes quod in vi illa extraxit cultellum suum ut eum occideret.”

“Wiltshire, Philip of Bristo appeals Robert Bloc for that when he was in his duel and fighting for certain land of his master William de Ponte des Arches in the County of Wilts and had prostrated his opponent, the said Robert came and wickedly and in the King’s peace took away his arms and gave him a blow on the head with the club of the prostrate champion—and this he offers to prove against him according to the direction of the Court, and Robert and all the knights defend the whole word by word and say that they were present at the duel as keepers of the field by direction of Adam the Cleric who was there in place of the Sheriff, and that they did no wrong there: and therein they put themselves upon the said Adam and upon the record of the County and pray that it be allowed in their behalf that all the champions were hired and that when the duel was fought, they then made no complaint in the County Court or elsewhere. It is considered that the Sheriff and the record of the County Court be summoned to Westminster for Friday in one month that a record may be there made.

Alexander of London appeals William de Percy of the same violence.

John Hereward appeals Hugh de Drueis and Robert de Mara of the same violence.

Roger Waiffe appeals William de Cotes that in the same assault he drew his knife to kill him."

It is of course impossible to find out the rights of this case—apparently there were several of these hired or professional champions and perhaps more than one duel. Whether one of the champions was pressing his advantage too far—possibly to get rid of a professional competitor—or the knights were partial or wished the play prolonged—whether some of the appellors were interfering with the keepers of the field—all these and many like questions lie in the realm of conjecture. A Sir Walter Scott could make much of the picture as we have it in the Rolls—but we hear nothing more about it—probably the professionals thought it better to drop their action than to run the risk of being "*in misericordia*."

The only other duel the account of which I extract has a domestic and romantic tint.

In Hilary Term, 1 Joh. (1200), a question arose between Ralph de Grafton who seems to have been Sheriff of Worcester and Hamon Passelewe which would depend upon a duel recorded in the Court of Malmesbury and Ralph was granted a writ to the Sheriff to have the record brought in "*per iiij milites legales de eadem curia*." Shortly afterwards in the same term we find "*Wilt*"—Gaufridus de Brinkworth Osmundus de Sumercot' Petrus de Eston' Willelums de Sumerford' missi pro curia de Malmesberi ad ferendum recordum duelli quod fuit in ea tempore Manaseri Biset inter Hugonem Malet tenentem et Odiernam de Luserne petentem de v hidis terre cum pertinentiis in Mureslega dicunt quod eum duellum conciteretur concordia facta fuit inter eos ita quod medietas totius predictae terre remaneret ipsi Hugoni et heredibus ejus in perpetuum et Odierne alia medietas tota vita sua et post ejus decessum remaneret Hamoni Passelew', qui pro ipsa pugnavit et heredibus ejus cum filia ipsius Hodierne in perpetuum"—"*Wiltshire*—Geoffrey de Brinkworth, Osmund de Sumercote, Peter of Eston, William de Sumerford sent on behalf of the Court of Malmesbury to bear the record of the duel which took place in it, in the time of Manaser Biset between Hugh Malet tenant and Odierna de Luserne claimant concerning five hides of land and appurtenances in Mursley say that when the duel was in active progress, an agreement was made between them that the half of the land aforesaid should remain in the said Hugh and his heirs forever and the other half go to Odierna for her whole life and after her decease

to Hamon Passelewe who fought for her, and his heirs by the daughter of the said Hodierna for ever."

Toronto.

WILLIAM RENWICK RIDDELL.

¹ The word "Attorney" (*Attornatus*) I find used only twice in the thousands of suits mentioned in these Rolls. The usual terminology is "Thomas filius Eustacii positus loco abbatisse de Winton." "Thomas FitzEnstace put in the place of the Abbess of Winchester." There are hundreds of entries like the following:—"Emma de Dunlege ponit loco suo Williamum de Rammescumbe versus Rogerum de Lega." "Emma de Dunlege puts in her place William of Rammescumbe against Roger of Leigh."

² It must be borne in mind that in very many if not most mediæval Latin manuscripts, the genitive and dative singular and nominative and vocative plural of nouns, pronouns and adjectives of the first declension have the termination "e" not "ae," cf. note 9, *post*.

³ I find one curious instance—Trinity Term 2 Joh. (1200) "Staff"—*Loquendum de vicecomite Staff' cui preceptum fecit ij vicibus fecere visum de infirmitate Amirie, uxoris Eborardi unde essoniavit⁶ se versus Rogerum le Gras; et non fecit: sed duo paupers, non milites, venerunt quo dixerunt quod eis preceptum fuit simul cum aliis videre ipsam Amiriam*—"Stafford. The King must be spoken to about the Sheriff of Stafford who had been twice ordered to make inspection concerning the sickness of Amiria, wife of Everard, when she essoigned herself against Roger the Fat; and he did not do it; but two poor men, not Knights, came who said that they had been ordered to see the said Amiria with others." Another entry in the same matter:—"Staff"—*Dies datus est Rogero Crasso petenti et Evarardo de Hunesworth de placito terre in Appelbi in Leic,* quia Amiria uxor Eborardi essoniavit se de malo lecti versus ipsum Rogerum." "Stafford. A day is given to Roger the Fat, demandant and Everard of Hunesworth in a plea of land in Appleby in Leicester because Amiria wife of Everard essoigned herself in a plea of sickness in bed against the said Roger." The writ given to the Sheriff for such a view was called "breve ad faciendum visum infirmitatem."

⁴ E.g. in Trinity Term 2 Joh. (1200) "Norht' Henricus del Aurei qui se essoniavit de malo lecti petit licenciam venendi ad curiam; et habet"—"Northampton. Henry del Aurei (or del Alneto) who essoigned himself on a plea of sickness in bed craves license of coming to Court; and has it." An earlier case reads (Trinity Term) 7 Ric. 1. (1195), "Linc"—Robertus de Bruer mandavit ad curiam die Sabbati proxima ante festum sancti Laurencii quod essoniavit se de malo lecti versus Gilbertum de Gaunt in curia domini regis apud Westmonasterium et quod non fuit visus et petiit licenciam veniendi ad curiam et habuit; et statim in septimana sequenti venit et optulit se"—"Lincoln—Robert of (Temple) Bruer (in Lincolnshire) sent word to the Court, the Sabbath day next before the Feast of St. Laurence that he essoigned himself from sickness against Gilbert of Gaunt in the King's Court at Westminster and that he was recovered and that he had not been seen and he prayed licence of coming into Court and he had it; and forthwith in the next week he came and offered himself.

Here is another of Michaelmas Term, 2 Joh. (1200), "Essex, Radulfus de Latton' qui se essoniavit de malo lecti versus Ricardum de Sifrewest', mandavit ad curiam per Johannem de Einesford' quod non fuit visus et quod convaleuit et petiit licenciam veniendi; et habet"—"Essex Ralph of (West) Layton (Yorkshire) who essoigned himself from sickness against Richard of Sifrewest sent word to the Court by John of Einesford that he had not been seen and that he had recovered and he prayed licence to come; and he has it."

⁵ Of course this should be the plural "dies."

⁶ Sometimes the return was not under seal; the entry then said "significavit sed non per breve suum sigillatum:" or equivalent language was employed.

⁷ Instead of "ad justiciarium," another MS. has the equivalent language: "domino G. filio Petri"—"to Lord Geoffrey Fitz Peter"—he was Chief Justiciar at the time.

⁸ There are a very few cases in which the party excuses non-attendance on the ground of difficulty of attendance "*de malo veniendi*"—this would cover bad roads, &c.

⁹ The form in many mediaeval manuscripts for "*quæ*," feminine singular of "*quis*": cf. note 2 *ante*.

¹⁰ The original spelling of the name: the family of Norwegian origin came to Normandy with Rollo, then a branch settled in Aquitania. Some members came into England with William the Conqueror in 1066 and made their way north. By this time my immediate ancestors had got to Cumberland. Geoffrey de Ridel, Chief Justiciæ, was a member of the family as was Ridel first Chancellor of Ireland. Geoffrey is named in a case in Eastern Term, 9 Ric. I. (1198) as the grandfather of Alice Cumin (Comyn) of Newbigging, Cumberland, and as having been "*tunc inimicus domini regis*"—"at that time an enemy of the King"—I presume Henry II. as Geoffrey Ridel was a Chief Justiciar of Stephen.

¹¹ There is a mistake either in the Roll itself or in the printing: "*Gaufridus filius Thome*" should read "*Gaufridus pater Thome*." A settlement was made: William Persona (the Parson) paid three marks (40 shillings) and Thomas "*Clamavit quietam*" cried quits.

¹² This should be "*campionis*"—the error in the Roll itself.

ANNUAL MEETING OF THE ONTARIO BAR ASSOCIATION.

The Annual Meeting of the Ontario Bar Association took place in Toronto on the evening of the 21st and the afternoon and evening of the 22nd of May. This year a somewhat radical departure was made from previous Annual Meetings inasmuch as all the formal business of the Association, including the reading of reports, special papers, and the election of officers for the ensuing year, was transacted at the Friday afternoon session.

The proceedings commenced with an informal dinner held at the Toronto Board of Trade at which the principal speaker was the Honourable N. W. Rowell, K.C., who gave an instructive address on the work of the Permanent Court of International Justice. This Court was constituted, Mr. Rowell pointed out, upon the recommendation of the first assembly of the League of Nations at Geneva. At the present time it consisted of eleven judges and four deputy judges whose salaries were paid by the signatories to the protocol. Until last year the Court had possessed only voluntary jurisdiction, that is, both nations to a dispute had to consent to have the question adjudicated upon by the Court. At the present time, however, it possesses com-

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THE HONOURABLE B. RUSSELL.

PUBLISHED FOR THE CANADIAN BAR ASSOCIATION

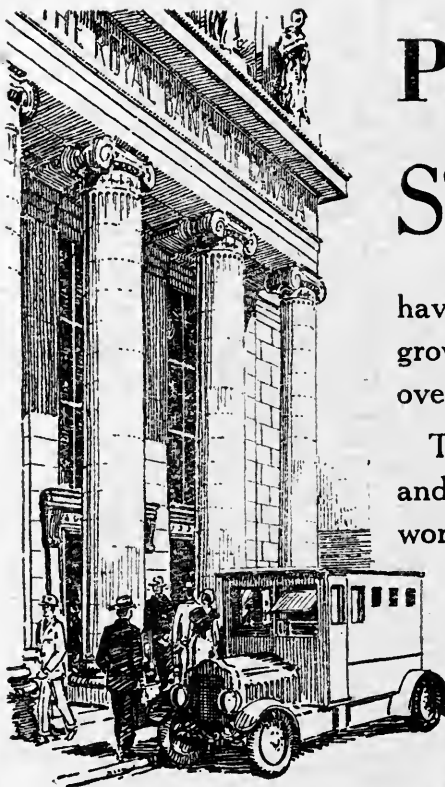
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act for the purpose of unifying the law resulted in an extensive exercise of Congressional power based upon the commerce clause of the Federal Constitution. But the movement to nationalize the law has not stopped with interstate commerce. There is an increasing effort to procure the enactment of Federal laws dealing with all kinds of matters, many of which are properly matters of local concern. While there are many commercial and industrial problems which, because of their interstate character, can be effectively dealt with only by a national law, it does not follow that all reforms should be nationwide in scope. In a country as large as the United States, with such diverse interests, that which may be a desirable law in one section may be quite undesirable in another. A law which may promote the social and economic well being in one section may prove to be ruinous to another. A law which may easily be enforced in one section may produce lawlessness and corruption in another.

Another cause of the perplexing difficulties which now confront us is that laws have been passed too freely without consideration of whether there existed the necessary machinery for their effective administration and enforcement. It must not be forgotten that the most desirable law may utterly fail to accomplish its purpose if suitable means are not provided for its proper administration. For some time we have been attempting to use the agencies for the administration of law which were devised by our fathers a century ago to perform much simpler tasks than those required by the complexities of modern life. We have grossly neglected this aspect of law making because we are relatively ignorant of the science of administrative law. Our universities have for years engaged in a study of the principles of substantive law, but have paid little attention to the problems of law administration. Millions of dollars have been spent through governmental and private agencies in discovering and pointing out social evils, but little has been spent for a scientific study of ways and means of curing them.

Before we go further with the expansion of the domain of positive law, we should give more thought to the limitations of law as a device for social control. We should more carefully distinguish between matters calling for national regulation and matters of local concern. We should make a more scientific study of the various devices for law administration with the view of adapting them to the tasks at hand. If properly employed, law may be made to better serve human interests, but it is a dangerous instrument in the hands of men who do not know how to use it.

YOUNG B. SMITH.

School of Law, Columbia University, New York.

“THE MYSTERY OF THE SEAL.”

We have all heard of the “Mystery of Seisin”: the interest in Seisin is almost a thing of the past, but the Seal is a living thing which raises its head every day in our Courts. Why a Seal or a red wafer should be so important is often puzzling: were an intelligent legislator to be called upon to frame a Code of Laws, *tabulâ rasâ* and unhampered by the past, he would never think to place so much importance on a token.

Of course much of our learning on the subject derives from times when few could write and many made their contracts, evidenced by a seal and not by a signature.

We are taught that even yet a specialty sealed need not be signed, although one would be very unwise not to insist on signature as well.

In two recent volumes published by the King's Printer, London, of the *Curia Regis Rolls of the Reigns of Richard I and John*¹ are a number of cases of Seals—I extract a few to show how the subject was considered when the Common Law was in the making.

In Trinity Term, 7 Richard I, (1196) in a Northampton case, an Assize² was held to determine whether William de Courtenay and others had unjustly disseised Richard de Blueville of certain lands in Newton—William's bailiff appeared and pleaded that William had seisin “per dominum G. filium Petri cujus breve protulit sine sigillo” —through Lord Geoffrey FitzPeter whose writ he produced without seal. As FitzPeter was Chief Justiciar, his writ would be a perfect answer,³ but unfortunately for de Courtenay, the document had no seal; it was so much waste paper “et ideo non omittitur quin assisa capiatur,” and consequently it is not omitted to take the assize.

In the result the jury⁴ found that William did not disseise Richard but his bailiff and his co-defendants did: Richard was given his land and 40 shillings damages,⁵ the bailiff and the co-defendant were fined 6s 8d each—all for the want of a seal.

The importance of the seal in judicial process is well shown in a Hereford case in Michaelmas Term, 4 John, (1202).

Walter Tyrrell had been summoned to hear judgment in a plea he had entered in an action concerning certain land: he neither appeared nor essoigned—but judgment was delayed to the Quindene

of St. Hilary, "quia sigillum justiciariorum non fuit apud Lond'" —Because the seal of the Justices was not at London.

These were in the Superior Court; but the seal was equally important to process in the Inferior Courts, the Comitatus or County Court, in which when acting judicially the Vicecomes, Sheriff, was Judge, if the action was begun by writ—for as *The Mirror* says, i, 15, "E celez courz sunt appellez countiez ou les jugemenz se funt par les sieuters si bref ne isoit"—and these Courts are called Counties where the judgments are made by the suitors if there is no writ.

The judicial decree of a Comitatus acting without the Sheriff could be certified by four Milites thereof; but that of the Sheriff only by writ sealed with his seal.

In Michaelmas Term, 4 John, (1202), in a Cornwall case, John de Lifton (Liston) sued Richard de Marisco for half a Knight's fee—Richard neither appeared nor essoigned,⁶ but judgment was delayed to the Octaves of St. Hilary: "quia idem Johannes tulit brevia sua quibus placitat sigillata sigillo vicecomitis, ut dicit"—because the said John had his writs under which he claimed, sealed with the seal of the Sheriff as he says.

The Court could not take judicial cognizance of the seal of a mere Vicecomes as it must of that of a Chief Justiciar: and John was given a chance to prove "brevia sua." However the Pleadings were noted closed: "et tunc alocetur ei quod ipse Ricardus non venit, etc'" —and, then, it was awarded in his behalf that the said Richard did not appear, etc. So that unless Richard purged his neglect, paying a smart fine to the King, all John would have to do would be to prove the seal of the Vicecomes.

When an Inferior Court had proceeded upon the writ of a former Chief Justiciar after "sigillum et justiciarius sunt . . . mutati,"⁷ its Milites coming to "make a Record," i.e., certify its judgment, found themselves in trouble—"curia illa inquisita fuit qua ratione tenuit placitum . . . antiquum factum tempore domini Rothomagiensis tunc justicarii, cum sigillum et justiciarius sunt postea mutati"—the said Court (of Arnold de Bosco) was asked for what reason it held plea (on a writ) made of old in the time of Lord (Walter de Constanciis, Archbishop) of Rouen then Justiciar when seal and Justiciar were afterwards changed. No wonder, "obmutuit"—it had nothing to say: the judgment of the Inferior Court went for nothing and the defendant William, son of Sweyn, kept the land.

That it was not safe for the Judge of an Inferior Court to meddle with the seal of writs: the Prior of Repedon' (Repton) learned this in Hilary Term, 10 Richard I. (1199). He had a local Court and one

Aldred, son of Ralph, brought him a writ of the King and two of the Archbishop of Canterbury—as he says himself, “*ipse ut simplex*,” he like a fool, took off the seals.

And when a Sheriff made a return, “*sed non per breve sigillatum*”—but not by writ under seal, as did the Sheriff of Somerset in Trinity Term, 2 John, (1,200), he knew about it.

It was not at all uncommon to deny a seal—in which case the parties generally put themselves upon witnesses; but not always, or exclusively.

In an Essex case in Hilary Term, 10 Richard I, (1199), William, son of Randolph, being vouched to warranty in respect to certain land in Middleton held by Baldwin—Gilbert, son of Ailnoth, being the voucher—came and said that the alleged grant was not his deed, “*et inde ponit se super plures testes vocatas in carta et super alias cartas quas ipse fecit tam Christianis quam Judeis; et Gilevertus offert probare quod cartam illam ei fecit per quendam filium suum Waltherum, qui hoc offert probare per corpus suum et per alios si quid mali de eo acciderit; Willelmus defendere hoc offert per quendam. Consideratum est. quod sciatur per testes nominatos in carta et per cartas Willelmi aliis ab eo factas si ipse cartam illam fecit nec ne*”—and therein he puts himself upon the several witnesses mentioned in the grant and upon other grants which he had made to Christians as well as to Jews: and Gilbert offers to prove that he did make this grant to him by a certain Walter, his son, who offers to prove this by his body¹⁰ and by others if any ill happen to him: William offers to defend this by a certain person. It is considered that it should be known whether he made the grant or not, by the witnesses named in the grant and by William’s grants to others.

Baldwin was in possession of certain land in Middleton in Essex: Gilbert claimed it; Baldwin defended: Gilbert asserting that he had a warranty deed from William, “*vouched him to warranty*,” *i.e.*, called upon him to make good his warranty: William said that he never made the deed and rested his defence on the witnesses named in the deed itself. Gilbert was not content with that but offered to prove the deed by his son Walter—he knew, of course, that Walter could not be allowed to give evidence, “*propter sanguinitatem*,” and the only way he could prove it was by a duel: Walter offered to prove it by Battel in his own person, or if any harm happened to him so that he could not himself fight he would find another champion: William was content with this and undertook to find a champion: the Court, however, decided to try the issue by the witnesses named in the deed

and by comparing the seal with the seals on other deeds made by William.

So in Easter Term, 2 John, (1201), in a Canterbury case when Ralph, son of Hugo, (as "attornatus") claimed certain lands from Phillip de Sumeri, Phillip said that Hugo sold him his interest by Fine levied in the land for ten shillings and a green cloak in the Court of Roger de Sumeri, and gave him a deed—he said that if the deed was not sufficient he would produce witnesses who were present at the sale. Ralph said that as to the sale and deed he would put himself upon the Court of Roger de Sumeri if he could see it: and, besides, he says that he has made divers deeds to divers men and he puts himself upon these deeds that the seal on this deed is not true, and if that is not sufficient he will defend himself by a certain person. We do not know how this would have come out, for "*Concordati sunt*"—they settled.

An interesting case is in Hilary Term, 10 Richard I, (1199), in Southampton when Samuel Mutun and Muriella, a Jewess, sue Herbert, the son of Herbert, for £400 on a certain deed—and produce "two Christians and two Jews" ready to prove it—"Herebertus dicit quod carta illa falsa est, et ideo falsa quia sigillum illud nunquam suum fuit nec cartam illam fecit nec pecuniam illam mutuo recepit, et producit sigillum suum eburneum et plures cartas sigillo illo sigillatas tam de abbaciis quam de confirmatione terrarum"—Herbert says that this deed is false, and false in this that that seal never was his nor did he make the deed nor did he receive the said money as a loan, and he produces his ivory seal and several deeds sealed with this seal as well concerning abbacy matters as confirmation of title to lands. (We are not told anything more of this case).

Perhaps the most usual way was trial by witnesses, as in a Surrey case in Trinity Term, 5 John, (1203), when Walkelinus Kabus vouched to warranty Ralph Postell in respect of a warranty deed of a hide of land in Coombe. Ralph put himself upon the witnesses named in the deed "*praeter quam in consaguineos Walkelini*"—and the witnesses were summoned five weeks after Michaelmas "*ad testificandum rei veritatem super cartam predictam*"—to testify to the truth of the matter in respect of the said grant.

Wrongful use of a seal admittedly genuine was occasionally charged. In a Northampton case in Easter Term, 9 Richard I, (1198), William de Plingen (Pinkeni, the modern Pinckney) when confronted with an alleged grant from his father and asked if he recognized the grant or seal said that it might well be his father's seal: That the mother of Robert, the plaintiff, had kept the seal from

him (William) for a long time until ordered to give it up by the King (*i.e.*, the Court) and that Robert's mother had made the deed to Robert after the death of William's father. Both parties put themselves upon the witnesses named in the deed and upon lawful men of the vicinage "*utrum carta illa sit legitima an non*," whether this grant is legitimate or not. (From another Record it would appear that Robert and William were brothers and the lady charged by William was the mother of Robert—it looks like another case of Jacob and Esau, or stepmother and stepson).

In Michaelmas Term, 2 John, (1200), in a Leicester case, William de Bosco claimed under a certain deed of warranty made by William de Coleville—the former put himself on the witnesses who were not "men" of the latter and the latter said the rest of the witnesses were consanguineous with the former and offered to deraign the agreement and deed by a certain free man of his—the Court reserved judgment until a month after Easter. The result we do not know, but if some of the witnesses were the "men" of one party and the rest were kin of the other, it would seem that there was nothing for it but Battel.

A suspicious deed was sometimes impounded.

In Michaelmas Term, 4 John, (1202), the Prior of St. Oswald's in York produced a deed purporting to be made by Robert Fossard giving the advowson of the Church of Lythe to his Priory: the attorneys of Robert attacked the deed in that "*videtur esse recenter facta*" it was obviously recently made, "*et ideo arestatur et traditur custodie*¹³ *domino G. filio Petri simul cum carta Willelmi Fossard donum confirmante*"—and consequently it was impounded and given in charge to my Lord Geoffrey FitzPeter along with the deed of William Fossard confirming the gift.

Perhaps enough has been said to show the importance of the Seal "at the Common Law."

WILLIAM RENWICK RIDDELL.

Toronto.

¹ Volume 1, 1922; volume 2, 1924.

² *I.e.*, a Grand Assize, Magna Assisa, on a Writ of Right.

³ As it would be granted after adjudication.

⁴ The twelve Juratores and four Milites would try the matter as a Jury.

⁵ Say \$200 in present values.

⁶ "Essoigned," gave sufficient excuse for non-attendance as *de malo lecti, de malo veniendi, de malo ville de ultra mare*, &c., &c.

⁷ After seal and Justiciar were changed."

⁸ In our Province a Writ of *Capias ad Satisfaciendum* was tested in the name of the Honourable Archibald McLean who had resigned and to succeed whom, William Henry Draper had been appointed and gazetted. This was held irregular and amendable on payment of costs: *Nelson v. Roy*, (1863), 3 P.R. 226.

⁹ Trial by Witnesses is one of Blackstone's seven species of trials in civil cases. *Commentaries, &c.*, iii, 331, 336, "by witnesses, *per testes*, without the intervention of a Jury . . . the only method of trial known to the Civil Law in which the Judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in our law which prefers the trial by jury before it in almost every instance." Trial by witnesses was never introduced into this Province—the Statute of 1792, 32 George III, c. 2 (U.C.) expressly directing that "every issue and issue of fact . . . in any action real, personal or mixed . . . shall be tried and determined by the unanimous verdict of twelve jurors . . ." sec. 1; sec. 2 allows Special Verdicts. At the Common Law, the witnesses to a deed did not sign it: they saw it sealed and then names were mentioned in the deed or endorsed.

¹⁰ I.e., by Battel—Walter offering himself as his father's champion (the eventuality of his disablement provided against); but the Court declines to award Battel and the trial is *per testes*, although the Vouchee is also willing to try by Battel having *quendam*, a certain person, as his champion.

¹¹ Comparison by the Judges with other seals was allowed; while instances are alleged of a person having more seals than one, the practice was almost unknown and wholly reprobated—*prima facie*, a man had only one seal. So to-day comparison with admitted or proved handwriting is allowed.

¹² I.e., Trial by Record, Blackstone's *Commentaries, &c.*, iii, 331.

¹³ It must always be borne in mind that in these mediæval MSS our dipthong "æ" was always "e."

Many witticisms of Westminster Hall, attributed to barristers of the Georgian and Victorian periods, are traceable to a much earlier date. There is the story of Serjeant Wilkins, whose excuse for drinking a pot of stout at mid-day was that he wanted to fuddle his brain down to the intellectual standard of a British jury. Two hundred and fifty years earlier, Sir John Millicent, a Cambridgeshire judge, on being asked how he got on with his brother judges replied, "Why, i'faith, I have no way but to drink myself down to the capacity of the Bench." And this merry thought has also been attributed to one eminent barrister who became Lord Chancellor, and to more than one Scottish advocate who ultimately attained to a seat on the Bench.

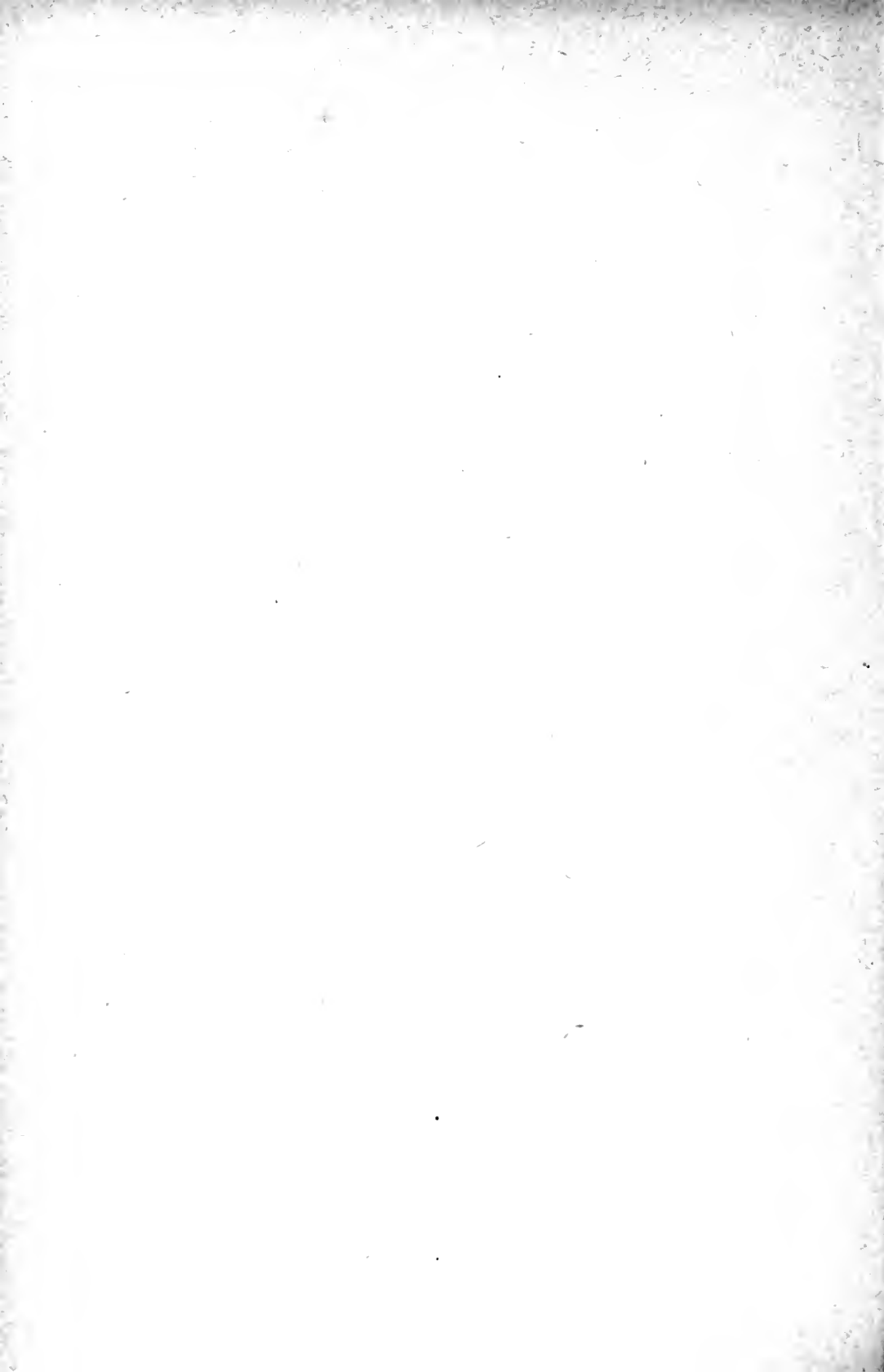
JUDICIAL SALARIES AND THE CHANGING DOLLAR.

One of the results of the war has been the development of a general interest in the value of money, beyond comparison greater than that exhibited before 1914. Then the average man assumed that a dollar was a dollar just as a yard was a yard. No doubt few people were aware that the legal yard was the distance between two fine lines on a bronze bar in the custody of the Department of Trade and Commerce at Ottawa, and still fewer that it was that distance when the bar was at a temperature of 61.9° Fahrenheit, neither more nor less.¹ Before the war every one believed himself to know what a yard was; every one so believes now, and for practical purposes every one is right. There used to be much the same confidence in the dollar's being the same yesterday, to-day and forever, but this confidence the events of the last ten years have greatly shaken. Interest in the dollar's value in terms of living has extended until it is now no longer limited as it was to exceptional persons, generally theorists, but sometimes men responsible for adjusting labour disputes, or for the management of business enterprises, particularly enterprises such as railways and street railways, whose legal charges were limited by contract or statute in terms of the dollar or fractions of it. Even lawyers, who above all other classes in the community should give attention to the foundations of contractual relations expressed in terms of money, have been slow to appreciate that general changes in price level are not really due to any change in real values, but to changes in their measure—that in one sense it is not the general level of prices which goes up and down, but the dollar which falls or rises. Although the price fluctuations of some groups of commodities were studied as long as 150 years ago, the systematic investigation of the variation in the unit of value is not much older than our very young Canadian Confederation. The war greatly stimulated general interest in the subject and the attention of some lawyers was directed to it in the strictly practical way of securing improvements in the tariffs which govern their fees. These tariffs are perhaps not even yet entirely satisfactory, and lawyers may be interested in an examination of the effects of the dollar's fluctuation by reference to a standard commodity with which they are familiar and of which they can readily appreciate the value.

¹ R.S.C. 1906, c. 52, s. 14.

“THE MYSTERY OF THE SEAL”

BY
WILLIAM RENWICK RIDDELL



“THE MYSTERY OF THE SEAL.”

We have all heard of the “Mystery of Seisin”: the interest in Seisin is almost a thing of the past, but the Seal is a living thing which raises its head every day in our Courts. Why a Seal or a red wafer should be so important is often puzzling: were an intelligent legislator to be called upon to frame a Code of Laws, *tabulâ rasâ* and unhampered by the past, he would never think to place so much importance on a token.

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In Michaelmas Term, 4 John, (1202), in a Cornwall case, John de Lifton (Liston) sued Richard de Marisco for half a Knight's fee—Richard neither appeared nor essoigned,⁶ but judgment was delayed to the Octaves of St. Hilary "quia idem Johannes tulit brevia sua quibus placitat sigillata sigillo vicecomitis, ut dicit"—because the said John had his writs under which he claimed, sealed with the seal of the Sheriff as he says.

The Court could not take judicial cognizance of the seal of a mere Vicecomes as it must of that of a Chief Justiciar: and John was given a chance to prove "brevia sua." However the Pleadings were noted closed: "et tunc alocetur ei quod ipse Ricardus non venit, etc."—and, then, it was awarded in his behalf that the said Richard did not appear, etc. So that unless Richard purged his neglect, paying a smart fine to the King, all John would have to do would be to prove the seal of the Vicecomes.

When an Inferior Court had proceeded upon the writ of a former Chief Justiciar after "sigillum et justiciarius sunt . . . mutati,"⁷ its Milites coming to "make a Record," *i.e.*, certify its judgment, found themselves in trouble—"curia illa inquisita fuit qua ratione tenuit placitum . . . antiquum factum tempore domini Rothomagensis tunc justicarii, cum sigillum et justiciarius sunt postea mutati"—the said Court (of Arnold de Bosco) was asked for what reason it held plea (on a writ) made of old in the time of Lord (Walter de Constanciis, Archbishop) of Rouen then Justiciar when seal and Justiciar were afterwards changed. No wonder, "obmutuit"—it had nothing to say: the judgment of the Inferior Court went for nothing and the defendant William, son of Sweyn, kept the land.

That it was not safe for the Judge of an Inferior Court to meddle with the seal of writs: the Prior of Repedon' (Repton) learned this in Hilary Term, 10 Richard I, (1199). He had a local Court and one

Aldred, son of Ralph, brought him a writ of the King and two of the Archbishop of Canterbury—as he says himself, “ipse ut simplex,” he like a fool, took off the seals.

And when a Sheriff made a return, “sed non per breve sigillatum”—but not by writ under seal, as did the Sheriff of Somerset in Trinity Term, 2 John, (1,200), he knew about it.

It was not at all uncommon to deny a seal—in which case the parties generally put themselves upon witnesses; but not always, or exclusively.

In an Essex case in Hilary Term, 10 Richard I, (1199), William, son of Randolph, being vouched to warranty in respect to certain land in Middleton held by Baldwin—Gilbert, son of Ailnoth, being the voucher—came and said that the alleged grant was not his deed, “et inde ponit se super plures testes vocatas in carta et super alias cartas quas ipse fecit tam Christianis quam Judeis; et Gilevertus offert probare quod cartam illam ei fecit per quendam filium suum Walterum, qui hoc offert probare per corpus suum et per alios si quid mali de eo acciderit; Willelmus defendere hoc offert per quendam. Consideratum est quod sciatur per testes nominatos in carta et per cartas Willelmi aliis ab eo factas si ipse cartam illam fecit nec ne”—and therein he puts himself upon the several witnesses mentioned in the grant and upon other grants which he had made to Christians as well as to Jews: and Gilbert offers to prove that he did make this grant to him by a certain Walter, his son, who offers to prove this by his body¹⁰ and by others if any ill happen to him: William offers to defend this by a certain person. It is considered that it should be known whether he made the grant or not, by the witnesses named in the grant and by William's grants to others.

Baldwin was in possession of certain land in Middleton in Essex: Gilbert claimed it; Baldwin defended: Gilbert asserting that he had a warranty deed from William, “vouched him to warranty,” *i.e.*, called upon him to make good his warranty: William said that he never made the deed and rested his defence on the witnesses named in the deed itself. Gilbert was not content with that but offered to prove the deed by his son Walter—he knew, of course, that Walter could not be allowed to give evidence, “propter sanguinitatem,” and the only way he could prove it was by a duel: Walter offered to prove it by Battel in his own person, or if any harm happened to him so that he could not himself fight he would find another champion: William was content with this and undertook to find a champion: the Court, however, decided to try the issue by the witnesses named in the deed

and by comparing the seal with the seals on other deeds made by William.

So in Easter Term, 2 John, (1201), in a Canterbury case when Ralph, son of Hugo, (as "attornatus") claimed certain lands from Phillip de Sumeri, Phillip said that Hugo sold him his interest by Fine levied in the land for ten shillings and a green cloak in the Court of Roger de Sumeri, and gave him a deed—he said that if the deed was not sufficient he would produce witnesses who were present at the sale. Ralph said that as to the sale and deed he would put himself upon the Court of Roger de Sumeri if he could see it: and, besides, he says that he has made divers deeds to divers men and he puts himself upon these deeds that the seal on this deed is not true, and if that is not sufficient he will defend himself by a certain person. We do not know how this would have come out, for "*Concordati sunt*"—they settled.

An interesting case is in Hilary Term, 10 Richard 1, (1199), in Southampton when Samuel Mutun and Muriella, a Jewess, sue Herbert, the son of Herbert, for £400 on a certain deed—and produce "two Christians and two Jews" ready to prove it—"Herebertus dicit quod carta illa falsa est, et ideo falsa quia sigillum illud nunquam suum fuit nec cartam illam fecit nec pecuniam illam mutuo recepit, et producit sigillum suum eburneum et plures cartas sigillo illo sigillatas tam de abbaciis quam de confirmatione terrarum"—Herbert says that this deed is false, and false in this that that seal never was his nor did he make the deed nor did he receive the said money as a loan, and he produces his ivory seal and several deeds sealed with this seal as well concerning abbacy matters as confirmation of title to lands. (We are not told anything more of this case).

Perhaps the most usual way was trial by witnesses, as in a Surrey case in Trinity Term, 5 John, (1203), when Walkelinus Kabus vouched to warranty Ralph Postell in respect of a warranty deed of a hide of land in Coombe. Ralph put himself upon the witnesses named in the deed "*praeter quam in consaguineos Walkelini*"—and the witnesses were summoned five weeks after Michaelmas "*ad testificandum rei veritatem super cartam predictam*"—to testify to the truth of the matter in respect of the said grant.

Wrongful use of a seal admittedly genuine was occasionally charged. In a Northampton case in Easter Term, 9 Richard 1, (1198), William de Plingen (Pinkeni, the modern Pinckney) when confronted with an alleged grant from his father and asked if he recognized the grant or seal said that it might well be his father's seal: That the mother of Robert, the plaintiff, had kept the seal from

him (William) for a long time until ordered to give it up by the King (*i.e.*, the Court) and that Robert's mother had made the deed to Robert after the death of William's father. Both parties put themselves upon the witnesses named in the deed and upon lawful men of the vicinage "*utrum carta illa sit legitima an non*," whether this grant is legitimate or not. (From another Record it would appear that Robert and William were brothers and the lady charged by William was the mother of Robert—it looks like another case of Jacob and Esau, or stepmother and stepson).

In Michaelmas Term, 2 John, (1200), in a Leicester case, William de Bosco claimed under a certain deed of warranty made by William de Coleville—the former put himself on the witnesses who were not "men" of the latter and the latter said the rest of the witnesses were consanguineous with the former and offered to deraign the agreement and deed by a certain free man of his—the Court reserved judgment until a month after Easter. The result we do not know, but if some of the witnesses were the "men" of one party and the rest were kin of the other, it would seem that there was nothing for it but Battel.

A suspicious deed was sometimes impounded.

In Michaelmas Term, 4 John, (1202), the Prior of St. Oswald's in York produced a deed purporting to be made by Robert Fossard giving the advowson of the Church of Lythe to his Priory: the attorneys of Robert attacked the deed in that "*videtur esse recenter facta*" it was obviously recently made, "*et ideo arestatur et traditur custodie*¹³ domino G. filio Petri simul cum carta Willelmi Fossard donum confirmante"—and consequently it was impounded and given in charge to my Lord Geoffrey FitzPeter along with the deed of William Fossard confirming the gift.

Perhaps enough has been said to show the importance of the Seal "at the Common Law."

WILLIAM RENWICK RIDDELL.

Toronto.

¹ Volume 1, 1922: volume 2, 1923.

² *I.e.*, a Grand Assize. Magna Assisa. on a Writ of Right.

³ As it would be granted after adjudication.

⁴ The twelve Juratores and four Milites would try the matter as a Jury.

⁵ Say \$200 in present values.

⁶ "Essoigned," gave sufficient excuse for non-attendance as *de malo lecti, de malo veniendi, de malo ville de ultra mare*, &c., &c.

⁷ After seal and Justiciar were changed."

⁸ In our Province a Writ of *Capias ad Satisfaciendum* was tested in the name of the Honourable Archibald McLean who had resigned and to succeed whom, William Henry Draper had been appointed and gazetted. This was held irregular and amendable on payment of costs: *Nelson v. Roy*, (1863), 3 P.R. 226.

⁹ Trial by Witnesses is one of Blackstone's seven species of trials in civil cases. *Commentaries, &c.*, iii, 331, 336, "by witnesses, *per testes*, without the intervention of a Jury . . . the only method of trial known to the Civil Law in which the Judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in our law which prefers the trial by jury before it in almost every instance." Trial by witnesses was never introduced into this Province—the Statute of 1792, 32 George III, c. 2 (U.C.) expressly directing that "every issue and issue of fact . . . in any action real, personal or mixed . . . shall be tried and determined by the unanimous verdict of twelve jurors . . ." sec. 1; sec. 2 allows Special Verdicts. At the Common Law, the witnesses to a deed did not sign it; they saw it sealed and then names were mentioned in the deed or endorsed.

¹⁰ I.e., by Battel—Walter offering himself as his father's champion (the eventuality of his disablement provided against); but the Court declines to award Battel and the trial is *per testes*, although the Vouchee is also willing to try by Battel having *quendam*, a certain person, as his champion.

¹¹ Comparison by the Judges with other seals was allowed; while instances are alleged of a person having more seals than one, the practice was almost unknown and wholly reprobated—*prima facie*, a man had only one seal. So to-day comparison with admitted or proved handwriting is allowed.

¹² I.e., Trial by Record, Blackstone's *Commentaries, &c.*, iii, 331.

¹³ It must always be borne in mind that in these mediæval MSS our diphthong "æ" was always "e."

THE CANADIAN BAR REVIEW

TORONTO, SEPTEMBER, 1926.

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THE CANADIAN BAR REVIEW

VOL. IV.

TORONTO, SEPTEMBER, 1926.

No. 7

DELEGATION OF POWERS OF PARLIAMENT.

Every Canadian lawyer understands the power in a British country of a legislative body in matters within its jurisdiction to delegate its authority to a body of its own creation ⁽¹⁾.

This is part of our inheritance from England, and is wholly repugnant to the conceptions of the other great branch of the English speaking people with their rigid and formal written Constitution ⁽²⁾.

It may be of interest to give an account of an early exercise of this power in England—the earliest that I have been able to trace: it was near the end of the 14th century. The young King, Richard II., after his most creditable and, indeed, marvellous success in dealing with Wat Tyler's followers, seems to have lost his head altogether and to have launched out into wild extravagances in temper as well as in finance. In 1386, the country through Parliament, led by his uncle, the Duke of Gloucester, called him to time and compelled him to put the administration of his affairs for a year in the hands of Commissioners named by Parliament. This was effected by Statute and a Royal Commission issued to eleven persons therein named ⁽³⁾.

While this has been considered by some a delegation of legislative powers⁽⁴⁾, a careful perusal of the documents themselves will show that such is not the case: what was delegated was administrative and executive, not legislative power.

The King and his favorites endeavored to get rid of the Commission by Sir Robert Tresilian, Chief Justice of the King's Bench, procuring an extrajudicial opinion from some of the Judges—a perfectly regular proceeding ⁽⁵⁾—that the Commission was a nullity and the Commissioners were traitors.

But one of the Judges ⁽⁶⁾ informed the Commissioners who immediately raised an army, and compelled the King to call a Parliament

This Parliament, the "Merciless Parliament" or "Wonder Working Parliament," meeting in 1388, began by hanging Tresilian and went on to exile to Ireland the other four offending Judges. The Commission, however, came to an end by efflux of time.

But a real delegation of legislative power was shortly to come: the power of the "v lordis", as Gloucester and the other leaders of his faction were often called, waned and disappeared. In 1397, the Parliament solemnly enacted that the Judges were right in 1387, when they considered the Statute and Commission of 1386 treasonous; but that Parliament, the "Grete Parlement" or "Great Parliament," itself went much further.

The old Chronicler informs us: "fferthirmore the Kyng made alle the men of this parlement coumpromitte in to xij diuers personenez continuyng the said parlement that where and whanne it likid thayme thay myghte make statutis aftir thair owen ordennance; and made alle the lordis swere vpon saint Edwardis shryne, forto kepe with al thair myghte the statutis of the same parlement; and at request of the parlement, alle the Bisshoppis acursid at Poulis cros alle who dede ayens the said statutis and ordenaunces." Then we are told: "And whanne this was ydo, the Kyng wente in to the west cuntre" ⁽⁷⁾.

The Statute justifies the description thus given of it ⁽⁸⁾. It begins by reciting that diverse petitions by special persons and others could not be properly attended to (ne purroient bonement estre terminez) during the short time Parliament sat; then it ordained that certain persons ⁽⁹⁾ named should examine, answer and fully dispose of the said petitions and the matters therein contained as to them should seem best. Of course in those days all legislation was, at least in theory, on petition to the King.

It is a far cry from 1397 to 1877 and from the "xij lordis and vj communes" of the second King Richard's time to the License Commissioners of Toronto of Queen Victoria's—but the principle is the same. Just one more instance of the splendid continuity of our institutions.

Toronto.

WILLIAM RENWICK RIDDELL.

¹ *Hodge v. The Queen* (1883), 9 A.C. 117; *Township of Sandwich East v. Union National Gas Co.* (1924), 56 O.L.R. 399 (1925), 57 O.L.R. 656.

²Cooley: *A Treatise on the Constitutional Limitations* . . . 7th ed., Boston, 1903, at p. 163. "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws can not be delegated by that department to any other body or authority . . ." See Black: *Handbook of American Constitutional Law*, 3rd ed., St. Paul, 1910, p. 374; my *Constitution of Canada*, Dodge Lectures, Yale University, 1917, p. 140, etc.

³The Statute is (1386) 10 Ric. II., c. 1, not printed in its place in the *Statutes at Large*; but in the *Appendix* in vol. 10, pp. 46-48 it is given in Law French and is not translated: the Commission is in *Rotuli Parliam.*, 10 Ric. II., pt. I, M7, it is translated in 1 *Cobbett's Parliamentary History* 191-193, and in part in 1 *State Trials*, 94, note (c).

⁴For example in the notes to *An English Chronicle* . . . written before the year, 1471 . . . Camden Society, 1856, the very learned editor, the Rev. John Silvester Davies, M.A., (whose annotations are very helpful), says p. 147, "In the parliament at Westminster, Oct. 1st, 1386, the Commons impeached Michael de la Pole the Chancellor, and placed the legislative power in the hands of fourteen commissioners selected by themselves with the King's sanction for one year (Knyghton, 2684, 2685: Rot. Parl. iii, 216-220: Stat. Realm, ii, 40-46)." The number of the Commissioners named in the documents is only eleven—the Archbishops of (1) Canterbury and (2) York, the Dukes of (3) Gloucester and (4) York, the Bishops of (5) Westminster and (6) Exeter, the Abbot of (7) Waltham, (8) the Earl of Arundel, (9) Sir John Cobham, (10) Sir Richard Lescrop and (11) Sir John Devereux.

⁵"A third Council belonging to the King are . . . his Judges of the Courts of Law, for law matters . . ." Blackstone: *Commentary on the Laws of England*, Bk. 1, p. 229. The practice of consulting the Judges on matters of law has long been obsolete: but it was frequently resorted to in ancient times. The best known instance is when Charles I. at the instance of Chief Justice Finch obtained an extrajudicial opinion on the legality of Writs of Ship Money.

The Council of Richard II. was held first at Shrewsbury—the Judges were summoned to Nottingham, August 25, 1387—they found not only the Questions but also the Answers all prepared by Tresilian; and on being threatened with death if they refused, they signed and sealed.

The Questions and Answers will be found in Lord Campbell's *Lives of the Chief Justices*, vol. 1, pp. 98-100: 1 *Parl. Hist.* 194-196: Statute (1397) 21 Ric. II., c. 12: *Ruffhead's Statutes at Large*, vol. 1, pp. 419-421.

⁶Sir Roger Fulthorpe, Justice of the Court of Common Bench.

⁷*An Old English Chronicle, ut supra*, p. 12. *compromit*, "to commit to, leave to the decision of . . . to delegate to some other person or persons." *New English Dictionary, sub voc.* See the use of the word in the examples given. The Statute justifying the Judges is (1397) 21 Ric. II., c. 12.

⁸This Statute is (1397) 21 Ric. II., c. 16: it is in Law French and is not translated. It is intitled "Authority given by Parliament to certain Commissioners to examine and answer Petitions addressed to the King."

⁹The Dukes of Lancaster, York, Albemarle, Surrey and Exeter, the Marquess of Dorset, the Earls de la Marche, of Salisbury, Northumberland, Gloucester, Worcester and Wilts or any six of them—watching for the Commons. John Buffy, Henry Green, John Russell, Richard Chelmeswyk, Robert Teye and John Golofre, Knights, or any three of them: a miniature Lords and Commons.

All the Acts of the Session of 1397 were repealed by (1399) 1 Hen. IV., c. 3.

THE RESIDUE OF POWER IN CANADA.

Between the interpretation of statutes and the interpretation of other legal documents the practice of our courts in the nineteenth century has drawn a distinction which cannot be defended either in strict logic or by ordinary common sense. In both cases the sound rule prevails that, where the written words are clear and unambiguous, extrinsic evidence to vary their meaning cannot be admitted. If, for example, a testator expresses himself in unambiguous words, these words must be given their full effect, even though evidence may be available to show that the testator did not mean exactly what he said. The same rule is applicable to contracts, statutes, and to all forms of written instruments.

But the difficulties of interpretation begin when words are not unambiguous, and it is at this point that our practice has drawn an arbitrary distinction between statutes and all other legal documents. In interpreting an obscure clause in a contract the court will take into consideration the whole of the previous correspondence between the parties and any words or conduct which may throw light upon their intentions. So again, if the words of a will are capable of two or more meanings, evidence is freely admitted to show what was passing in the testator's mind when he wrote those words. In all these cases our law is in accordance with common sense and with the ordinary practice of historical and literary criticism in other branches of learning.

If the application of this rule were extended to the interpretation of statutes it would follow that obscure clauses could be elucidated by studying the debates in Parliament and the considered public utterances of statesmen responsible for the introduction of the new law. Clearly such a practice would be in accordance with the well-known rules of construction laid down by the Court of Exchequer in *Heydon's Case*,¹ where it was ruled that the points for consideration are: (a) What was the common law before the making of the Act (b) What was the mischief and defect against which the common law did not provide (c) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth (d) The true reason of the remedy. It is obvious that for three

¹ 2 Co. Rep. 7b., p. 19.

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TORONTO, FEBRUARY, 1927.

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The **Bondage of Debt**

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debt are not free. They control neither their
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Incidentally, I met there a young German lawyer from Bremen who had been an artillery observation officer in an advanced post in the "Salient" on June 1st and 2nd, 1916, when the 3rd Canadian Division and particularly the C.M.R.'s were almost wiped out, and it was rather a peculiar sensation to discuss with him the pros and cons of that affair—which had become so intimate a memory to us both.

It is proposed to hold the next Congress of the International Law Association in Washington, and if this materializes I feel that the Canadian Bar Association should be represented, and I am certain that any Canadians attending will be most welcome, and be given every consideration possible.

From Vienna the delegation went by boat to Budapest, where they spent the week-end as the guests of the city, and needless to say these days were very interesting and enjoyable ones.

But as the official business of the Conference had been completed at Vienna, I need not here go into the details of our entertainment in Budapest, save to say that I feel deeply indebted to our hosts for their hospitality.

NORMAN A. M. MACKENZIE.

University of Toronto.

MINISTERS TO CANADA AND IRELAND.—It is announced in the American press that the appointment of William Phillips, now Ambassador to Belgium, as the United States Minister to Canada was formally made on February 4th at the State Department, coupled with an official confirmation of the selection of Frederick A. Sterling to be Minister to Dublin. Mr. Phillips has had a wide experience abroad, and his appointment is in the nature of a compliment to Canada.

WOMEN AT LAW SEVEN CENTURIES AGO.

The two volumes recently published by His Majesty's Stationery Office, London: "Curia Regis Rolls of the Reigns of Richard I. and John . . .," are a delight to all who take an interest in the Common Law of England—and what Canadian or American lawyer does not?

It is the purpose of this paper to give some account—necessarily imperfect—of actions at law by or against woman in the Curia Regis in the last years of the 12th and the first of the 13th Centuries.

The well-known Common Law doctrine that husband and wife are one was, of course, in full force. Consequently, when a married woman sued without her husband it was a sufficient answer to say that she had a living husband; and if this was admitted, the defendant—or she—would "go without a day." It was seldom that the admission was made. In Hilary Term¹ 10 Richard I. (1199) we have: "Hunted—"Angnes filia Gileberti portavit breve de nova disseisina versus Hugonem de Scalaria de XX acris cum pertinentiis in Teddeworth': et Hugo dixit quod assisa esse non debet quia ipsa habet virum qui non nominatur in brevi. Et quia incertum erat de viro suo utrum vivat necne, concesserunt justiciarii ut concordarent se: et concordati sunt per sic quod ipsa Angnes quietum clamavit predicto Hugoni totum jus et claimium suum quod habuit in terra illa pro j marca quam ipse ei dedit." Huntingdon. Agnes,² daughter of Gilbert, brought a writ of novel disseisin against Hugh³ de Scalaria, concerning twenty acres with one messuage and appurtenances in Toddeworth:⁴ and Hugh said that an Assize should not be had, (i.e., Agnes could not claim a Grand Assize) because she has a husband who is not named in the writ. And inasmuch as it was uncertain about her husband whether he was alive or not, the Justices allowed that a settlement should be made and they agreed, on the terms that the said Agnes cried quits (quit-claimed) to the said Hugh all her right and claim in the land for one mark (13/4) which he gave to her."

Another case contains elements of humour.

In H. T., 4 Jo., (1203):—"Buk'—Euticia qui fuit uxor Gervasii per Robertum filium suum petit versus Abbatem de Nutele rationabilem dotem suam scilicet j virgatam terre cum pertinentiis in Wichendon' unde predictus Gervasius quondam vir suus eam dotavit ad

hostium ecclesie: et Radulfus atornatus abbatis venit et dicit quod ipsa Euticia habet virum, et sine eo non vult respondere nisi curia consideraverit: et atornatus Euticia quod ideo non debet placitum remanere quia ipsa diu post placitum mutum maritavit se: et atornatus abbatis non potuit hoc negare. Consideratum est quod quia mulieres quandoque cum maritantur animum mutant, ipsa veniat cum viro suo apud Westmonasterium a die Pasche in j mensem: et simul sequantur si voluerit vel atornatum faciant."

Buckingham. Euticia,⁵ who was the wife of Gervase suing by her son Robert⁷ claims against the Abbot of Nutley⁶ her reasonable dower, that is one virgate of land⁷ with appurtenances in Winchendon whereof the said Gervase, formerly her husband, endowed her at the Church door:⁸ and Ralph, the Attorney⁹ of the Abbot, comes and says that the said Euticia has a husband and that he does not wish to plead without him unless the Court should so direct: and the Attorney of Euticia says that the action should not abate for that reason, inasmuch as she married long after the action began and the Attorney of Abbot could not deny this:¹⁰ It was considered that, inasmuch as women sometimes change their mind when they marry, she should appear with her husband at Westminster in one month¹¹ after Easter, and let them sue together if he¹² wishes or constitute an attorney.

While the husband was *dominus litis*, the wife in a proper case was not wholly without protection.

Thus, in M.T., 2 Jo., (1200), when Godfrey of St. Martin,¹³ sued by Wandrillus of Corcelles over certain land in Fisherton, Wiltshire, was summoned to hear judgment, he appeared and defended for himself and Constance his wife, a day was fixed in the Octaves of All Saints and "*Godefridus habeat Constanciam uxorem ejus tunc apud Westmonasterium ut sciatur si ipsa voluerit tenere se ad defensionem viri sui.*" Let Godfrey have Constance, his wife, then at Westminster, that it may be known if she wishes to abide by the defence of her husband.¹⁴

A stronger case with some interesting features began in H. T., I Jo., (1200), when Henry de Deneston¹⁵ sued Nicholas de Wineston and Avice his wife, by Writ of Right for four bovates of land with appurtenances in Butterson, Staffordshire. Avice came and said that the land was her hereditament "*et quod per pecuniam et fraudem Henrici, Nicolaus vir suus absentat se et eam deseruit ita quod timet per fraudem exheredari,*" and that through the money and fraud of Henry (the plaintiff) Nicholas, her husband, absents himself and

deserted her, so that she fears to be deprived of her hereditament by fraud. She prayed the Justices to take care therein and moreover offered to place herself on the Grand Assize of the King "which of them had the better right in this land." A day was fixed one month after Easter for hearing judgment.

Easter came around and Michaelmas Term; Henry and Avice appeared to hear judgment, but a new day was fixed for the Morrow of St. Edmund, Avice still contending and Henry denying "*quod vir ejus eam reliquit et non vult defendere terram suam corruptus dono ipsius Henrici*," that her husband abandoned her and does not wish to defend her land, corrupted by a bribe from the said Henry.

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What the result would have been had the woman not been able to equal the plaintiff's bid we can only conjecture, but as it was, '*dominus rex motus misericordia et per consilium recipit oblacionem ipsius Hawisie. Habeat ergo mangnam assisam*,' our Lord the King, moved by pity and by council, accepts the gift of the said Avice. Let her, therefore, have a Great Assize. A day was fixed: "*et tunc veniant iiij ad eligendum xij*" and then let twelve milites) come to select twelve (recognitors). Avice must, however, give security for the 40 shillings—William of Wrattlesle becomes her bondsman for it

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The husband does not seem always to have been the erring one.

When in M. T., 3 Jo., (1201), Robert de Coleville, suing for himself and his wife, Alice de Frostendenne (who had formally before Geoffrey Fitz Peter, the Chief Justiciar, constituted him her Attorney *pro hac vice*), brought an action against Alexander de Pointell and Alice of London, his wife, for the dower of the female plaintiff in certain lands in Westminster which were the property of her late husband, William of London, Alexander came and defended, but "*Alicia uxor ejus non comparuit*"—Alice his wife did not appear. Robert asked that her default should be noted; and Alexander "*dicit quod ipsa nunquam fecit se essoniari per ipsum et quod ipsa non fuit cum ipso iij annis elapsis*"—said that she never had herself essoigned by him¹⁹ and that she had not been with him for three years back.

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ried—this, of course, was tried in the Ecclesiastical Court of the Bishop of Lincoln—but she failed to keep the land because it had been deeded to her husband by the Canons of Croxton, who failed to make good the title when vouched to warranty: accordingly, in H. T., 4 Jo., (1203), she sued them to make compensation, *escambium*, for the lands so lost and had a writ to the Sheriff of Lincoln to have valued “*per visum legalium hominum*,” by view of lawful men, the land she had lost. Then, in T. T., 5 Jo., (1203), the Abbot of Croxton gave her three bovates of land in Croxton to hold *in escambium*—and if that should be more in value than what she had lost “*amensurabitur per amicos suos*”—it will be measured off by their friends.²⁰

Another stepmother who had her marriage disputed, was Cecilia de Cressi: she, in E. T., 2 Jo., (1201), sued her stepson William, for dower in the land of his father, Roger de Cressi: William came into Court and objected that she never was married to Roger; the cause was transmitted to the Archbishop of York “*ventilanda*,” to be enquired into: he reported that it was established by competent witnesses that she had been legally married. Then William was summoned to hear judgment in M. T., 3 Jo., (1201): he appeared and said that if His Lordship of York did certify this to the Justices, he did it of his own volition and that if he did take evidence, he took it unjustly and against law and ecclesiastical custom: he offered gages and pledges therein to deraign either in the King’s Court or elsewhere: “*adjecit etiam quod, si eam desponsaverit, eam desponsavit in lecto suo egritudinis et postquam se religioni contulerat et concesserat*”—he added, moreover, that if he did marry her he married her on his sickbed²¹ and after he had devoted and vowed himself to religion. A day was given them to hear judgment “*in XV dies post festum sancti Yllarii*”—the Quindene (or Quindecim) of St. Hilary, that is, a fortnight²² after St. Hilary’s Day.

Cecily must have been successful: we find her sued later on, in E. T., 4 Jo., (1203), under the name Cecilie de Cressy, by her stepson, William, acting by his Attorney about some chattels: the case was adjourned “*quia Cecilia petiit audire breve per quod posita est in placitum, quod est in itinere justiciarorum itinerantium*”—because Cecilia asked to hear the writ by which she was brought into the action, which was in the Eyre of the Justices Itinerant. She knew her rights, and knowing, dared maintain: perhaps we should not hold it against her that she was married by a man on his deathbed under the urging of his spiritual advisers: we rather rejoice that the marriage was held valid.²³

The legality of an alleged marriage was brought in question by the woman herself, in an Essex case, in T. T., 5 Jo., (1203). The Record is somewhat longer than usual, but by reason of its interest I transcribe it in full. "*Essex.—Assisa venit recognitura si Willelmus Basset injuste et sine judicio disseisivit Biatriciam de Taenden de libero tenemento suo in Parva Waberg' infra assisam: et Willelmus venit et dicit quod ipsa Biatricia est uxor sua et intravit in terram illam ut in suam propriam et uxoris ejus: et ipsa dicit quod revera ipse desponsavit eam set non legitime; unde cum lis esset inde coram R. archidiacono Colestr' Ricardo de Stortford' magistro scholarum Lond' et magistro Benedicto de Sauseton de matrimonio eorum auctoritate literarum domini pape judicatum fuit coram eis divorcium quia cum alia nomine Matillide adhuc vivente prius contraxerat; et inde protulit literas patentes predictorum judicum idem testancium; econtra Willelmus dicit quod injuste illud judicaverunt super appellacionem suam, ita quod ipse impetravit super hoc literas domini pape quibus ipse committit causam illam fine debito terminandam abbati de Betlesden' et prioribus Saneti Andree Norht' et de Essebi. Et quia Willelmus negare non potest quin divorcium factum fuerit inter ipsos Willelmum et Beatriciam, ut patere potest per querelam ipsius Willelmi quam dominus papa per literas suas significat predictis judicibus, et quia congnoxit se predicto modo ingressam fuisse in terram illam, consideratum est quod Willelmus sit in misericordia et Biatricia sine jurata habeat seisinam suam: et juratores quesiti dicunt quod dampnum est xiiij marce. Willelmus de Fifhid' cepit in manum quod Willelmus Basset non recessurus est a curia antequam Biatricie fecerit de dampno"—*

Essex.—An Assize comes to find if William Basset unjustly and without adjudication disseised Beatrice de Taidenne of her free tenement in Little Wakering (in Essex County) since the (last) assize, and William comes and says that Beatrice is his wife and he entered on the land as his own property and that of his wife: and she says that in truth he did marry her but not lawfully; that when the case had been tried therein before R. Archdeacon of Colchester, Richard de Storteford Master of the Schools of London and Master Bennet de Sauseton concerning their marriage by authority of our Lord the Pope a divorce was adjudged inasmuch as he had previously contracted with another woman, Maud by name, still living—and therein she produced the Letters Patent of the said judges testifying the same: on the other hand William said that they adjudged this unjustly against his appeal so that he sued out against this decision letters of Our Lord the Pope by which he committed the

cause for proper adjudication to the Abbot of Biddlesdon and the Priors of St. Andrew's, Northampton, and of Ashby, And inasmuch as William is not able to deny that a divorce had been made between them, William and Beatrice, as might appear by the complaint of the said William which Our Lord the Pope signified by his Letters Patent to the said Judges and inasmuch as he admits that his entry was made in the manner aforesaid in the land, it is considered that William be in mercy and Beatrice have her seisin without the jury and the jurors being asked said that the damage is 13 marks (£8-16-8). William de Fyfield took it in hand that William Basset should not go from the Court until he had given satisfaction to Beatrice for her damages.²³ The other contemporary Record adds: "*Postea plegiatus fuit quod gratum . . . faceret infra festum sancti Michaelis*" after he became bound that he would satisfy the judgment after Michaelmas.

Occasionally the lady litigant came in for judicial rebuke. For example in T.T., 5 Jo., (1203), Leviva, who was the widow of William the son of Constantine, sued Richard de Brethram (i.e. Brettenham in Norfolkshire) for her dower in certain lands in West Winez (Winch) and Lenna (Lynn), the property of her deceased husband—the case was adjourned "*Et sciendum quod ipsa Leviva produxit Constantin filium et warrantum suum qui infra etatem est; et preceptum est quod remaneat domi*"—and be it known that the said Leviva produced Constantine her son and warrantor who is under age; and it was ordered that he should stay at home.²⁴

Women were not always too friendly with those of their own sex. In H.T., 10 Ric. I., (1199) we read:

"Norf"—*Angnes uxor Odonis Mercatoris appellavit Gillenam de sorceri: et ipsa liberata est per iudicium ferri et ideo Angnes remanet in misericordia,*" Norfolk—Agnes wife of Odo Merchant appealed Gillian of sorcery and she was cleared by ordeal of hot iron and so Agnes remains in mercy. Unless poverty or some other excuse could be urged Agnes would have to pay a fine to the King; but she who was accused of witchcraft could count herself lucky and (probably) thank the officiating priest. This case, by the way, shows that the law writers, including Blackstone, are in error in their enumeration of the kinds of felony in which appeal could be had—but that is another story.

Equally fortunate was another woman Appellee in Norfolkshire, in T.T., 5 Jo., (1203).

"Norf"—*Matillis de Rames' appellat Margerim uxorem Radulfi Kellac quod in pace domini regis eam imprisonavit et in firmina*

tenuit et verberavit ita quod abortivit, et hoc offert probare versus eam, etc.: et Margeria venit et defendit totum et dicit quod alia vice coram justiciariis appellavit Radulfum Kelloc virum suum de eodem facto transactis X annis; quod non potuit negare. Unde Margeria recedit quieta, et Matillis in misericordia. Pauper est. Misericordia perdonatur." Maud de Ramsey appeals Margery, wife of Ralph Kelloc,²⁵ that in the King's peace she imprisoned her and kept her in close confinement and beat her so that she aborted, and this she offers to prove against her, etc.; and Margery comes and defends the whole; and she says that at another time before the Justices she (Maud) appealed Ralph Kelloc, her husband, of the same deed ten years ago: which she could not deny. Consequently Margery went away acquitted and Maud in mercy. She is poor. The fine is remitted.

In T.T., 2 Jo., (1200), we find the following interesting case:

"Oxon'—*Ascelina Vidua petit versus Hugonem de Chishamton' unam virgatam terre in Chishamton' sicut jus suum et hereditatem quam Hugo frater suus dedit ei in liberum maritagium et quam ipse ei injuste deforciat: Hugo venit et dicit quod vir suus et ipsa alia vice tulerunt breve de nova disseisina versus eum in curia domini regis tempore archiepiscopi Rotomagensis et jurata dixit quod ipse non disseisivit eos sine iudicio sed per iudicium comitatus cujus recordum venit per preceptum justiciariorum apud Westmonasterium et inde vocat rotulos domini regis; et Hugo requisitus si aliud dicere vellet dixit quod poneret se super visnetum inde. Et quia non defendit jus suum nec quod terra illa non esset maritagium predicate Asceline et si quid actum fuerit tempore viri sui in illa assisa de maritagio suo, non videtur quod ipsa ideo debet amittere jus suum inde. Ideo consideratum est quod ipsa habeat inde seisinam."* Oxford. The widow Ascelina sues Hugh de Chishamton for one virgate of land in Chishamton as her right and hereditament, which Hugh her brother gave to her *in liberum maritagium*, and of which he unjustly deforces her; Hugh comes and says that her husband and she at another time brought an action of Novel Disseisin against him in the Court of Our Lord the King when (Walter de Constantius) the Archbishop of Rouen was Justiciar and the Jury said that he did not disseise them without judgment, but by the judgment of the County Court the record of which came by order of the Justices to Westminster—and therein he vouches the records of Our Lord the King; and Hugh, being asked if he wished to say anything else said that he put himself upon the vicinage therein. And inasmuch as he does not defend his right or deny that the land was the *maritagium* of Ascelina aforesaid—and if

anything was done in the lifetime of her husband in the Assize concerning her maritagium it does not appear that she should thereby lose her right therein: Therefore it is considered that she had her seisin therein.

The following in M.T., 2 Jo., (1200), has its interesting side:

"*Glouc'*.—*Willelmus de Novò Mercato, summonitus ad ostendendum quod jus clamat in uxore quam rex Ricardus dedit Roberto de Tresgoz et in baronia sua, venit et dixit quod duxit eam tempore regis Ricardi et ex dono Roberti Dewias patris predictæ uxoris. Capietur. Traditur est Reginaldo de Balun in custodiam.*"

Gloucester.—William of New Market summoned to show what right he claimed in the wife whom King Richard gave to Robert de Tresgoz and in her barony, came and said that he married her in the time of King Richard and on the gift of Robert Dewias, father of the wife aforesaid. He is attached. She is given in custody to Reginald de Balun.

The question at the altar: "Who giveth this woman?" had then some significance, and one cannot but think that Robert had more interest in "*baronia sua*" than in "*predicta uxor*."

Toronto.

WILLIAM RENWICK RIDDELL.

¹ Hereafter the following contractions will be employed: H. T., Hilary Term; M. T., Michaelmas Term; T. T., Trinity Term; E. T., Easter Term; the regnal years will be given thus: 10 Ric. I., 10th of Richard I.; 1 Jo., 1st of John, &c.—the date will be given in Arabic numerals in parenthesis.

² In these records, it is very common to insert an "n" before "gn," i.e.: *Agnes, congruuit, congritura, mangua, frengni, significat*, &c. This was to soften the sound; cf., the insertion of "p" before "n" in "dampnum."

³ Or Hugo.

⁴ Now Tetworth.

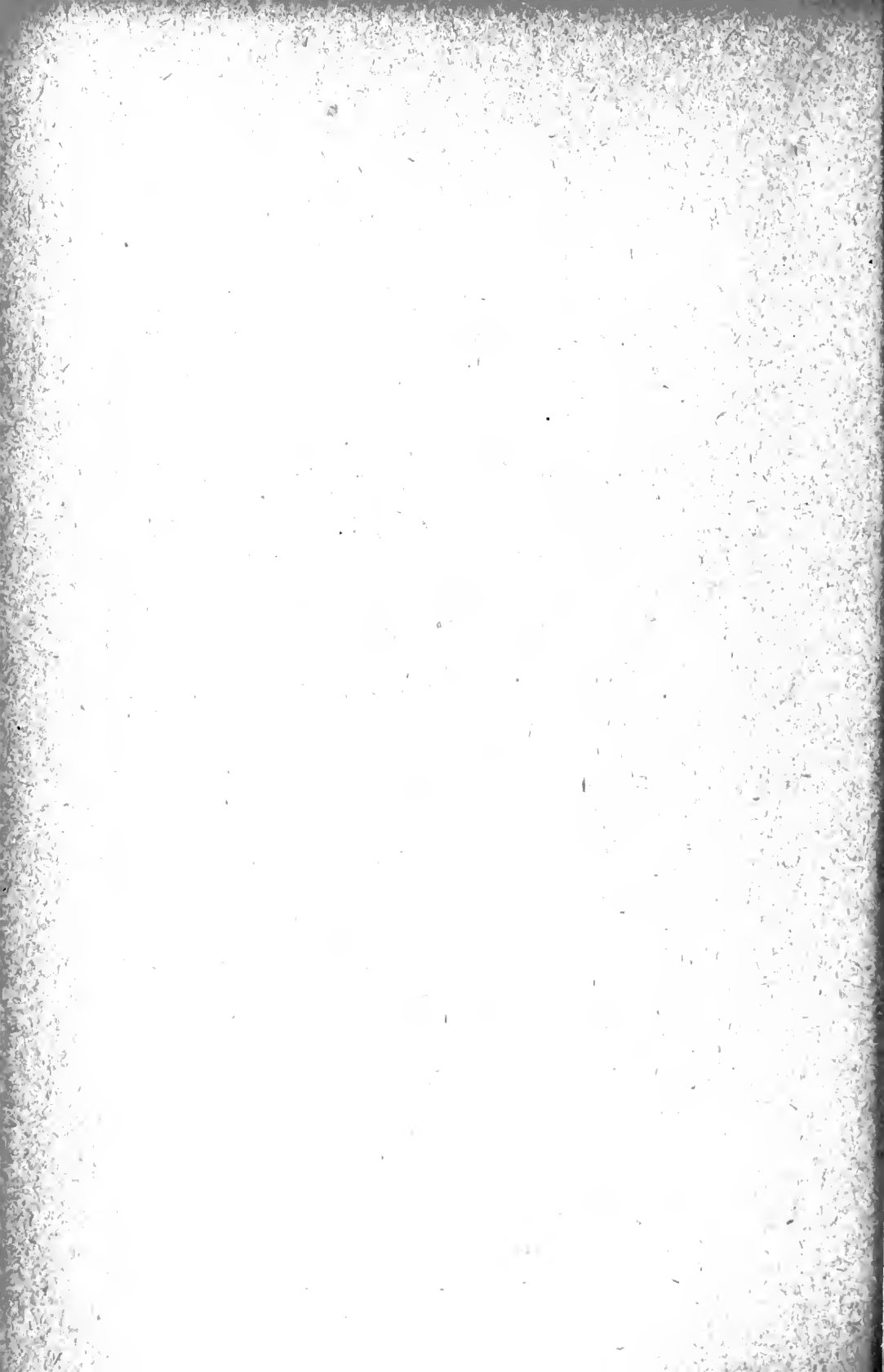
⁵ "Euticia" is a variant of "Eustacia" or "Eustasia." The action began in M. T., 3 Jo., (1201), when Euticia "*ponit loco suo Robertum filium suum*," i.e., made her son Robert her attorney "*ad lucrandum vel perdendum*," win or lose. The Abbot by his attorney, Radulfus de Treg, craved a view; he was granted it and a day was given to hear the cause one month after the Feast of St. Hilary—it was after this, that the plaintiff married again.

⁶ In Long Crendon, Buckinghamshire; with that freedom in spelling—one can hardly call it orthography—enjoyed by the language until Dr. Johnson put it in fetters, the name appears in these records as Nutele, Notele, Nutelee, Nutle, Nutles—it is also called Newehus.

⁷ It must be borne in mind that in these as in many mediæval MSS., the termination of nouns, pronouns and adjectives of the First Declension in the genitive and dative singular and nominative and vocative plural is written "e" and not "æ"; even the nominative and vocative plural neuter of qui and —and, generally where we write "æ" the single letter "e" was employed. See Du Cange, *passim*.

WOMEN AT LAW
SEVEN CENTURIES AGO

BY
The Honourable WILLIAM RENWICK RIDDELL
LLD., D.C.L., Etc.



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The three volumes recently published by His Majesty's Stationery Office, London: "Curia Regis Rolls of the Reigns of Richard I. and John . . .," are a delight to all who take an interest in the Common Law of England—and what Canadian or American lawyer does not?

It is the purpose of this paper to give some account—necessarily imperfect—of actions at law by or against woman in the Curia Regis in the last years of the 12th and the first of the 13th Centuries.

The well-known Common Law doctrine that husband and wife are one was, of course, in full force. Consequently, when a married woman sued without her husband, it was a sufficient answer to say that she had a living husband; and if this was admitted, the defendant—or she—would "go without a day." It was seldom that the admission was made. In Hilary Term¹ 10 Richard I. (1199) we have: "Hunted—*'Angnes filia Gileberti portavit breve de nova disseisina versus Hugonem de Scalariis de XX acris cum uno mesagio cum pertinentiis in Toddeworth': et Hugo dixit quod assisa esse non debet quia ipsa habet virum qui non nominatur in brevi. Et quia incertum erat de viro suo utrum vivat necne, concesserunt justiciarii ut concordarent se: et concordati sunt per sic quod ipsa Angnes quietum clamavit predicto Hugoni totum jus et clamium suum quod habuit in terra illa pro j marca quam ipse et dedit.*" Huntingdon. Agnes,² daughter of Gilbert, brought a writ of novel disseisin against Hugh³ de Scalariis, concerning twenty acres with one messuage and appurtenances in Toddeworth:⁴ and Hugh said that an Assize should not be had, (*i.e.*, Agnes could not claim a Grand Assize) because she has a husband who is not named in the writ. And inasmuch as it was uncertain about her husband whether he was alive or not, the Justices allowed that a settlement should be made and they agreed, on the terms that the said Agnes cried quits (quit-claimed) to the said Hugh all her right and claim in the land for one mark (13/4) which he gave to her."

Another case contains elements of humour.

In H. T., 4 Jo., (1203):—"Buk'—*Euticia qui fuit uxor Gervasii per Robertum filium suum petit versus abbatem de Nutele rationabilem dotem suam scilicet j virgatam terre cum pertinentiis in Wichendon' unde predictus Gervasius quondam vir suus eam dotavit ad*

hostium ecclesie: et Radulfus atornatus abbatis venit et dicit quod ipsa Euticia habet virum, et sine eo non vult respondere nisi curia consideraverit: et atornatus Euticie quod ideo non debet placitum remanere quia ipsa diu post placitum motum maritavit se: et atornatus abbatis non potuit hoc negare. Consideratum est quod quia mulieres quandoque cum maritantur animum mutant, ipsa veniat cum viro suo apud Westmonasterium a die Pasche in j mensem: et simul sequantur si voluerit vel atornatum faciant."

Buckingham. Euticia,⁵ who was the wife of Gervase suing by her son Robert claims against the Abbot of Nutley⁶ her reasonable dower, that is one virgate of land⁷ with appurtenances in Winchendon whereof the said Gervase, formerly her husband, endowed her at the Church door:⁸ and Ralph, the Attorney⁹ of the Abbot, comes and says that the said Euticia has a husband and that he does not wish to plead without him unless the Court should so direct: and the Attorney of Euticia says that the action should not abate for that reason, inasmuch as she married long after the action began and the Attorney of Abbot could not deny this:¹⁰ It was considered that, inasmuch as women sometimes change their mind when they marry, she should appear with her husband at Westminster in one month¹¹ after Easter, and let them sue together if he¹² wishes or constitute an attorney.

While the husband was *dominus litis*, the wife in a proper case was not wholly without protection.

Thus, in M.T., 2 Jo., (1200), when Godfrey of St. Martin,¹⁸ sued by Wandrillus of Corcelles over certain land in Fisherton, Wiltshire, was summoned to hear judgment, he appeared and defended for himself and Constance his wife, a day was fixed in the Octaves of All Saints and "*Godefridus habeat Custanciam uxorem ejus tunc apud Westmonasterium ut sciatur si ipsa voluerit tenere se ad defensionem viri sui.*" Let Godfrey have Constance, his wife, then at Westminster, that it may be known if she wishes to abide by the defence of her husband.¹⁴

A stronger case with some interesting features began in H. T., I Jo., (1200), when Henry de Deneston¹⁵ sued Nicholas de Wineston and Avice his wife, by Writ of Right for four bovates of land with appurtenances in Butterton, Staffordshire. Avice came and said that the land was her hereditament "*et quod per pecuniam et fraudem Henrici, Nicolaus vir suus absentat se et eam deseruit ita quod timet per fraudem exheredari,*" and that through the money and fraud of Henry (the plaintiff) Nicholas, her husband, absents himself and

deserted her, so that she fears to be deprived of her hereditament by fraud. She prayed the Justices to take care therein and moreover offered to place herself on the Grand Assize of the King "which of them had the better right in this land." A day was fixed one month after Easter for hearing judgment.

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What the result would have been had the woman not been able to equal the plaintiff's bid we can only conjecture, but as it was, '*dominus rex motus misericordia et per consilium recipit oblacionem ipsius Hawisie. Habeat ergo mangnam assisam*,' our Lord the King, moved by pity and by council, accepts the gift of the said Avice. Let her, therefore, have a Great Assize. A day was fixed: "*et tunc veniant iiij ad eligendum xij*" and then let twelve (milites) come to select twelve (recognitors). Avice must, however, give security for the 40 shillings—William of Wrattesle becomes her bondsman for it

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It was not always plain sailing for a widow claiming dower even when she did marry again. In M. T., 3 Jo., (1201), Agnes de Croxton, claiming to be the widow of Philip de Dive (Rich?) sued his son Philip for dower *unde nichil habet* in lands in Holywell, Witham and Twyford, Lincolnshire; he appeared and said that she had never been married to his father, "*ipsa econtra dicit quod legitime desponsata fuit*," she, on the other hand, says that she was lawfully married: and it was ordered that she should have a writ to the Official of the Bishop of Lincoln to inquire whether she had been lawfully married or not.

Agnes was successful in her claim to have been lawfully mar-

ried—this, of course, was tried in the Ecclesiastical Court of the Bishop of Lincoln—but she failed to keep the land because it had been deeded to her husband by the Canons of Croxton, who failed to make good the title when vouched to warranty: accordingly, in H. T., 4 Jo., (1203), she sued them to make compensation, *escambium*, for the lands so lost and had a writ to the Sheriff of Lincoln to have valued “*per visum legalium hominum*,” by view of lawful men, the land she had lost. Then, in T. T., 5 Jo., (1203), the Abbot of Croxton gave her three bovates of land in Croxton to hold *in escambium*—and if that should be more in value than what she had lost “*amensurabitur per amicos suos*”—it will be measured off by their friends.²⁰

Another stepmother who had her marriage disputed, was Cecilia de Cressi: she, in E. T., 2 Jo., (1201), sued her stepson William, for dower in the land of his father, Roger de Cressi: William came into Court and objected that she never was married to Roger; the cause was transmitted to the Archbishop of York “*ventilanda*,” to be enquired into: he reported that it was established by competent witnesses that she had been legally married. Then William was summoned to hear judgment in M. T., 3 Jo., (1201): he appeared and said that if His Lordship of York did certify this to the Justices, he did it of his own volition and that if he did take evidence, he took it unjustly and against law and ecclesiastical custom: he offered gages and pledges therein to deraign either in the King’s Court or elsewhere: “*adjecit etiam quod, si eam desponsaverit, eam desponsavit in lecto suo egritudinis et postquam se religioni contulerat et concesserat*”—he added, moreover, that if he did marry her he married her on his sickbed²¹ and after he had devoted and vowed himself to religion. A day was given them to hear judgment “*in XV dies post festum sancti Yllarii*”—the Quindene (or Quindecim) of St. Hilary, that is, a fortnight²² after St. Hilary’s Day.

Cecily must have been successful: we find her sued later on, in E. T., 4 Jo., (1203), under the name Cecilie de Cressy, by her stepson, William, acting by his Attorney about some chattels: the case was adjourned “*quia Cecilia petiit audire breve per quod posita est in placitum, quod est in itinere justiciarorum itinerantium*”—because Cecilia asked to hear the writ by which she was brought into the action, which was in the Eyre of the Justices Itinerant. She knew her rights, and knowing, dared maintain: perhaps we should not hold it against her that she was married by a man on his deathbed under the urging of his spiritual advisers: we rather rejoice that the marriage was held valid.²³

The legality of an alleged marriage was brought in question by the woman herself, in an Essex case, in T. T., 5 Jo., (1203). The Record is somewhat longer than usual, but by reason of its interest I transcribe it in full. "*Essex.—Assisa venit recognitura si Willelmus Basset injuste et sine judicio disseisivit Biatriciam de Taenden' de libero tenemento suo in Parva Waberg' infra assisam: et Willelmus venit et dicit quod ipsa Biatricia est uxor sua et intravit in terram illam ut in suam propriam et uxoris ejus: et ipsa dicit quod revera ipse desponsavit eam set non legitime; unde cum lis esset inde coram R. archidiacono Colestr' Ricardo de Stortford' magistro scholarum Lond' et magistro Benedicto de Sauseton' de matrimonio eorum auctoritate literarum domini pape, judicatum fuit coram eis divorcium, quia cum alia nomine Matillide adhuc vivente prius contraxerat; et inde protulit literas patentes predictorum judicum idem testancium; econtra Willelmus dicit quod injuste illud judicaverunt super appellacionem suam, ita quod ipse impetravit super hoc literas domini pape quibus ipse committit causam illam fine debito terminandam abbati de Betlesden' et prioribus Sancti Andree Norht' et de Essebi. Et quia Willelmus negare non potest quin divorcium factum fuerit inter ipsos Willelmum et Beatriciam, ut patere potest per querelam ipsius Willelmi quam dominus papa per literas suas significat predictis judicibus, et quia cognovit se predicto modo ingressam fuisse in terram illam, consideratum est quod Willelmus sit in misericordia et Biatricia sine jurata habeat seisinam suam: et juratores quesiti dicunt quod dampnum est xiiij marce. Willelmus de Fifhid' cepit in manum quod Willelmus Basset non recessurus est a curia antequam Biatricie fecerit de dampno*"—

Essex.—An Assize comes to find if William Basset unjustly and without adjudication disseised Beatrice de Taidenne of her free tenement in Little Wakering (in Essex County) since the (last) assize, and William comes and says that Beatrice is his wife and he entered on the land as his own property and that of his wife: and she says that in truth he did marry her but not lawfully; that when the case had been tried therein before R. Archdeacon of Colchester, Richard de Storteford Master of the Schools of London and Master Bennet de Sauseton concerning their marriage by authority of our Lord the Pope a divorce was adjudged inasmuch as he had previously contracted with another woman, Maud by name, still living—and therein she produced the Letters Patent of the said judges testifying the same: on the other hand William said that they adjudged this unjustly against his appeal so that he sued out against this decision letters of Our Lord the Pope by which he committed the

cause for proper adjudication to the Abbot of Biddlesdon and the Priors of St. Andrew's, Northampton, and of Ashby, And inasmuch as William is not able to deny that a divorce had been made between them, William and Beatrice, as might appear by the complaint of the said William which Our Lord the Pope signified by his Letters Patent to the said Judges and inasmuch as he admits that his entry was made in the manner aforesaid in the land, it is considered that William be in mercy and Beatrice have her seisin without the jury and the jurors being asked said that the damage is 13 marks (£8-16-8). William de Fyfield took it in hand that William Basset should not go from the Court until he had given satisfaction to Beatrice for her damages.²³ The other contemporary Record adds: "*Postea plegiatus fuit quod gratum . . . faceret infra festum sancti Michaelis*" after he became bound that he would satisfy the judgment after Michaelmas.

Occasionally the lady litigant came in for judicial rebuke. For example in T.T., 5 Jo., (1203), Leviva, who was the widow of William the son of Constantine, sued Richard de Brethram (i.e. Brettenham in Norfolkshire) for her dower in certain lands in West Winez (Winch) and Lenna (Lynn), the property of her deceased husband—the case was adjourned "*Et sciendum quod ipsa Leviva produxit Constantin filium et warrantum suum qui infra etatem est; et preceptum est quod remaneat domi*"—and be it known that the said Leviva produced Constantine her son and warrantor who is under age; and it was ordered that he should stay at home.²⁴

Women were not always too friendly with those of their own sex. In H.T., 10 Ric. I., (1199) we read:

"Norf'—*Agnes uxor Odonis Mercatoris appellavit Gilienam de sorceria: et ipsa liberata est per iudicium ferri et ideo Agnes remanet in misericordia,*" Norfolk—Agnes wife of Odo Merchant appealed Gillian of sorcery and she was cleared by ordeal of hot iron and so Agnes remains in mercy. Unless poverty or some other excuse could be urged Agnes would have to pay a fine to the King; but she who was accused of witchcraft could count herself lucky and (probably) thank the officiating priest. This case, by the way, shows that the law writers, including Blackstone, are in error in their enumeration of the kinds of felony in which Appeal could be had—but that is another story.

Equally fortunate was another woman Appellee in Norfolkshire, in T.T., 5 Jo., (1203).

"Norf'—*Matillis de Rames' appellat Margeriam uxorem Radulfi Kellac quod in pace domini regis eam imprisonavit et in firmina*

tenuit et verberavit ita quod abortivit; et hoc offert probare versus eam, etc.: et Margeria venit et defendit totum et dicit quod alia vice coram justiciariis appellavit Radulfum Kelloc virum suum de eodem facto transactis x annis; quod non potuit negare. Unde Margeria recedit quieta, et Matillis in misericordia. Pauper est. Misericordia perdonatur." Maud de Ramsey appeals Margery, wife of Ralph Kelloc,²⁵ that in the King's peace she imprisoned her and kept her in close confinement and beat her so that she aborted, and this she offers to prove against her, etc.; and Margery comes and defends the whole; and she says that at another time before the Justices she (Maud) appealed Ralph Kelloc, her husband, of the same deed ten years ago: which she could not deny. Consequently Margery went away acquitted and Maud in mercy. She is poor. The fine is remitted.

In T.T., 2 Jo., (1200), we find the following interesting case:

"Oxon'—*Ascelina Vidua petit versus Hugonem de Chishamton' unam virgatam terre in Chishamton' sicut jus suum et hereditatem quam Hugo frater suus dedit ei in liberum maritagium et quam ipse ei injuste deforciat: Hugo venit et dicit quod vir suus et ipsa alia vice tulerunt breve de nova disseisina versus eum in curia domini regis tempore archiepiscopi Rotomagensis et jurata dixit quod ipse non disseisivit eos sine iudicio sed per iudicium comitatus cujus recordum venit per preceptum justiciariorum apud Westmonasterium et inde vocat rotulos domini regis; et Hugo requisitus si aliud dicere vellet dixit quod poneret se super visnetum inde. Et quia non defendit jus suum nec quod terra illa non esset maritagium predictae Asceline et si quid actum fuerit tempore viri sui in illa assisa de maritaggio suo, non videtur quod ipsa ideo debet amittere jus suum inde. Ideo consideratum est quod ipsa habeat inde seisinam.*" Oxford. The widow Ascelina sues Hugh de Chishamton for one virgate of land in Chishamton as her right and hereditament, which Hugh her brother gave to her *in liberum maritagium*, and of which he unjustly deforces her; Hugh comes and says that her husband and she at another time brought an action of Novel Disseisin against him in the Court of Our Lord the King when (Walter de Constantius) the Archbishop of Rouen was Justiciar and the Jury said that he did not disseise them without judgment, but by the judgment of the County Court the record of which came by order of the Justices to Westminster—and therein he vouches the records of Our Lord the King; and Hugh, being asked if he wished to say anything else said that he put himself upon the vicinage therein. And inasmuch as he does not defend his right or deny that the land was the *maritagium* of Ascelina aforesaid—and if

anything was done in the lifetime of her husband in the Assize concerning her maritagium it does not appear that she should thereby lose her right therein: Therefore it is considered that she had her seisin therein.

The following in M.T., 2 Jo., (1200), has its interesting side:

"Glouc'.—*Willelmus de Novo Mercato, summonitus ad ostendum quod jus clamat in uxore quam rex Ricardus dedit Roberto de Tresgoz et in baronia sua, venit et dixit quod duxit eam tempore regis Ricardi et ex dono Roberti Dewias patris predictæ uxoris. Capiatur. Traditur est Reginaldo de Balun in custodiam.*"

Gloucester.—William of New Market summoned to show what right he claimed in the wife whom King Richard gave to Robert de Tresgoz and in her barony, came and said that he married her in the time of King Richard and on the gift of Robert Dewias, father of the wife aforesaid. He is attached. She is given in custody to Reginald de Balun.

The question at the altar: "Who giveth this woman?" had then some significance, and one cannot but think that Robert had more interest in "*baronia sua*" than in "*predicta uxor.*"

Toronto.

WILLIAM RENWICK RIDDELL.

¹ Hereinafter the following contractions will be employed: H. T., Hilary Term; M. T., Michaelmas Term; T. T., Trinity Term; E. T., Easter Term; the regnal years will be given thus: 10 Ric. I., 10th of Richard I.; 1 Jo., 1st of John, &c.—the date will be given in Arabic numerals in parenthesis.

² In these records, it is very common to insert an "n" before "gn," i.e.: *Agnes, congruuit, congritura, mangna, rengni, significat*, &c. This was to soften the sound; cf., the insertion of "p" before "n" in "dampnum."

³ Or Hugo.

⁴ Now Tetworth.

⁵ "Euticia" is a variant of "Eustacia" or "Eustasia." The action began in M. T., 3 Jo., (1201), when Euticia "*ponit loco suo Robertum filium suum,*" i.e., made her son Robert her attorney "*ad lucrandum vel perdendum,*" win or lose. The Abbot by his attorney, Radulfus de Treg, craved a view: he was granted it and a day was given to hear the cause one month after the Feast of St. Hilary—it was after this, that the plaintiff married again.

⁶ In Long Crendon, Buckinghamshire; with that freedom in spelling—one can hardly call it orthography—enjoyed by the language until Dr. Johnson put it in fetters, the name appears in these records as Nutele, Notele, Nutelee, Nutle, Nutles—it is also called Newehus.

⁷ It must be borne in mind that in these as in many mediæval MSS., the termination of nouns, pronouns and adjectives of the First Declension in the genitive and dative singular and nominative and vocative plural is written "e" and not "ae"; even the nominative and vocative plural neuter of qui and quis—and, generally where we write "ae" the single letter "e" was employed. See Du Cange, *passim*. The only instances in Hase volumes of the genitive in "ae" are where the nominative in "a" was first written by mistake; and "e" was added to form a genitive.

Terra was thus declined:—

	Singular.	Plural.
Nom.	<i>terra</i>	<i>terre</i>
Gen.	<i>terre</i>	<i>terrarum</i>
Dat.	<i>terre</i>	<i>terrīs</i>
Acc.	<i>terram</i>	<i> terras</i>
Voc.	<i>terra</i>	<i>terre</i>
Abt.	<i>terra</i>	<i>terrīs</i>

⁸ For the dower *ad ostium ecclesiae*, see Blackstone, *Comm.* Bk. 3: the form "*hostium*" is as common as "*ostium*."

⁹ Variouslly written "*Atornatus*," "*Attornatus*," "*Aturnatus*." The Attorney was generally *pro hac vice*, but occasionally a general Attorney was appointed, e.g., by an Abbott, Master of Templars, Bishop, etc. I find, *inter alia*, such appointments by the Bishop of Ely, the Prior of the Templars at London, E. T., 9 Ric. I., (1198), the Abbott of Seez, H. T., 10 Ric. I., (1199). Sometimes a woman acted as Attorney, e.g., in E.T. 4 Jo., (1203), Robert of Ybemia and Edith, his wife, claimed certain land in Southwark held by "*Cristiane*." Christiana made her husband Robert her attorney, while Robertus de Ybemia "*ponit loco suo Editham uxorem suam*." In M.T., 4 Jo., (1202), Hugo Golding and Maud his wife sued Juliana de Brocton for certain land—"Hugo ponit loco suo Matillidem uxorem suam," etc.; *Juliana ponit loco suo Simonem filium Simonis*, etc.: Hugo made Maude his wife his attorney, Juliana made Simon Simonson her attorney. So, too, in T.T., 5 Jo., (1203), Ancelina mother of William son of Simon was made his attorney by her son in an action against Richard son of Alvred about two and a half virgates of land and one toft with appurtenances in Asgarby, Lincolnshire.

¹⁰ If this were denied, there must have been a trial—probably by the witnesses present at the marriage.

¹¹ One month at the Common Law was 28 days—"iiii Septimanas."

¹² She had nothing to say about it—non *voluerint* sed *voluerit*.

¹³ "*Godefridus de Sancto Martino*"—his wife was "*Constancia*"—his opponent "*Wandrillus de Curcell*" and the land in "*Fisserton*."

¹⁴ There is a variant reading "*ad defensionem suam vel ad defensionem Godofredi*"—her own defence or Godfrey's defence; Godfrey's defence was that he had never been summoned in the action; obviously the wife might have a good defence on the merits and it would or might be in the highest degree unwise to rely upon the husband's technical defence alone.

¹⁵ *Deneston, Donestan, Duneston; Wineston, Winestre, Winstre* (alias Waterfal); *Hawis, Hawise, Hawisie, Hawisia; Boterdon, Burteston, Buterdon*, are the variant spellings.

¹⁶ The Grand Assize, *Assisa magna*, was the alternative provided by Henry II. with the assent of his "*Magnates*" for trial by Battel on a claim for land—the usual fee-offering for a Great Assize continued to be 6/8 until the Writ of Right was abolished in 1826. It was solemnly adjudged in M.T. 3 Jo., (1201) that "*ubi nullum fit duellum, non jacet magna assisa*"—where there is no duel, grand assize does not lie. An action had been brought for certain land in Wallingford, Berkshire; the tenant, defendant, "*posuerat se in magnam assisam conditionaliter, scilicet si libertas ville quam habent . . . sufficeret*" had placed himself upon the Grand Assize conditionally, that is to say if the liberties of the ville extend that far. It was found that there could be no Wager of Battel, no "*duellum*," in Wallingford, consequently the Grand Assize could not proceed.

The practice was for the defendant to take out a writ to the Sheriff to select four Knights "*milites*," these selected twelve recognitors "*qui discreti sunt et qui rei veritatem sciunt et quorum nullus predictos affinitate contingat*"—who are discreet and who know the truth of the matter and none of whom is of affinity with the said parties—E. T., 4 Jo., (1203).

The case in Wallingford had gone so far that the four Milites had been selected by the Sheriff.

²¹ In the Writ of Right, *Breve de Recto*, the plaintiff was called Petens, the defendant, Tenens—it thus appears that Avise was in possession of the land claimed.

²² The Knights were *Hamo de Weston, Mansel de Pattesbull, Nicolaus de Burteston* and *Paganus de Parles*—the names of the persons selected are given at length in the record. While generally the names of only twelve are given, occasionally we find more as here.

The case immediately before this is curious. Gilbert the son of William de Ria (i.e., of Rye) charged Adam of St. Quentin with the murder of his (Gilbert's) brother Hugh; Adam denied the charge and on the "Appeal of Felony" offered to defend himself in the "*duellum*" by Gilbert the son of Nicholas whom he claimed to be his nephew. The Appellor denied the relationship and contended that the proposed champion was not "*adeo propinquus ei (Adame) in parentela quod possit de jure et secundum consuetudinem Anglie ipsum super hoc defendere*" so near of kin to him that he might defend himself thereby according to law and the custom of England. A writ of enquiry was issued and the jury (13 names are given) said that there was no kinship between Adam the Appellee, and Gilbert, the son of Nicholas, "*nec ex parte patris, nec ex parte matris*"—on either the father's or mother's side. It is not unlikely that Gilbert was one of the professional champions, *campiones conductitii*, of whom we read in H. T., 10 Ric. I., (1199), in an Appeal of Felony of Philip of Bristo against Robert Bloc, charging him with wounding him in the head with the club of an opposing champion whom Philip had felled.

²³ The doctrine of Essoigns was of great importance in the Common Law. One could essoign himself, i.e., excuse his non-appearance in Court *de malo lecti* (sickness), *de malo veniendi* (difficulty of travel) *de malo ville* (sickness after arriving at the Assize town) &c.; but he must send an essoniator, essoigner, to make the excuse or he would be *in misericordia*, in mercy, and liable to a fine, his land might be taken *in manum regis*, &c., &c.

²⁴ The Abbot had made his Attorney, Warren, his Canon, Agnes had appointed Arnold de Bilesdon. Where lands were to be given *in escambium*, if the parties did not agree, the Sheriff had a writ to make the *escambium*—H. T., 1 Jo., (1200), *Roger Nicholson v. William de Din*—and if given in dower, it was held only for life.

²⁵ In an action in the M.T., 2 Jo., (1200), between Peter de Sandiacre and Walter Malet, Roger de Cressi was one of the recognitores selected; however, he did not attend the Court but essoigned himself; he was probably ill at that time.

²⁶ At the Common Law the first and last days are inclusive: "*XV. dies*," 15 days, is a fortnight.

²⁷ Giving oneself to religion was not unusual—there are several instances in these records. In M. T., 3 Jo., (1201), Saer de Audeham left Court without a day because Walter de Benetestede whom he had impleaded concerning a military fee in Biddlesdon, Essex, "*reddidit se religioni*"—rendered himself to religion. In E. T., 4 Jo., (1203), Eudo de Baillol in an action with Reginald Basset over certain land in Yorkshire essoigned himself on the ground of sickness, *de malo lecti*. Basset was sceptical about the illness and sued out a writ to the Sheriff of York to send four Knights to view the alleged invalid—the Sheriff selected Robert de Buleford, Philip de Bilingee, Osmund Crozere and Geoffrey de Etton; they reported that he was not sick and that they had given him a day a fortnight after Easter, "and be it known that a certain man of Eudo's comes and says that he took the habit of religion after the view by the Knights." Alan de Hatton, also in litigation with Eudo, was alike sceptical, and when Eudo's man stated that he had taken the religious habit *pre nimia infirmitate*, he doubted it and had the land seized by the Sheriff and Eudo resummoned, E. T., 4 Jo., (1203).

Eudo had in fact taken the habit of religion, as we find, T.T., 5 Jo., (1203). Geoffrey Fitz Peter, the Chief Justiciar, signifying to the Justices that they should not permit his son Eudo, who was under age, to be impleaded concerning any tenement "*quod pater ejus tenuit die qua habitum religionis*

suscepit donec heres talis sit etatis quod secundum consuetudinem rengni debeat placitari"—which his father held upon the day he assumed the religious habit, until such heir shall be of such age as by the custom of the realm, he may be impleaded.

Blackstone just touches on the custom as of course the civil effect which such an action had had in Catholic times had ceased.

²² The names are variously written: *Tainden'*, *Taidenn'*; *Beatricia*, *Biatricia*; *Stortford'*, *Storteford'*; *Sause-ton'*, *Fausinton'*, *Faufitun'*; *Colestr'*, *Colecestr'*; *Betlesden'*, *Botlesdon'*.

From another contemporary Roll one learns that the name of the Archdeacon of Colchester was Radulfus, i.e., Ralph, and that Richard de Stortford was Master of the London Schools and Chancellor of St. Paul's. This Roll also supplies the word "gratum" before the word "*Biatricie*" where it last occurs. The index-maker in the volume of Curia Regis Rolls considers that William Basset had a former wife, Maud (Matillis), living; this is an error, the impediment to lawful marriage was precontract, not previous marriage—the doctrine of precontract in the Canon Law is of course well known. The *divorcium* was *ab initio*. For the form "pape," "Andre," "marce," "*Biatricie*," see note 7, *ante*. The evolution of the Latin "ille," "illa," into the article (French *le*, *la*, etc.) is manifest in these Records.

Magister Benedictus de Fauston (or Fausinton) figures as a litigant in a case in M. T., 4 Jo., (1202), H. T., 4 Jo., (1203), over 10 acres of land in Batburgam (Babraham), Cambridgeshire, elsewhere called Badburham.

Juries were not always able to determine the damages; in an action for disturbance of Market-right in M. T., 4 Jo., (1202), brought against Eustace, the Bishop of Ely, by the Abbot of St. Edmund's, claiming that the Bishop's Market at Lakingheath, Suffolk, was a damage to that of the Abbot at St. Edmund's, the jury of sixteen Knights was called on the consent and wish of the parties to try whether the Bishop's market "*ibi esse non debeat vel possit secundum consuetudinem Anglie*," should not or cannot be there by the custom of England. We are told "*Juratores dicunt quod mercatum de Lakinheia est ad nocumentum mercati Sancti Edmundi eo quod caro mortua et viva et piscis et bladum et plures mercature, que solebant aportari ad Sanctum Edmundum et ibi vendi, unde Abbas habuit consuetudines, modo deferuntur apud Lakingeh' et ibi venduntur, ita quod abbas perdit consuetudines, Et milites, requisiti quantum dampnum habeat per mercatum illud, dicunt quod nesciunt nec aliquis scit nisi solus Deus*"—the jurors say that the Market at Lakingheath is a damage to the market of St. Edmund's in that meat killed and on the hoof and fish and corn and many wares which were wont to be carried to St. Edmund's and there sold from which the Abbot had dues, were now taken to Lakingheath and there sold so that the Abbot loses his dues. And the Knights being required to find what damages he suffered from this Market, say that they do not know nor does anyone else know but God alone. A day was given to hear judgment at the Octaves of St. Hilary—the Abbot appointing William de Neketon and afterwards Gilbert de Stagno, his Attorney, and the Bishop, Simon de Insula (his Seneschal), or William Uncle or Thomas de Huntedon.

The result is not given in these records.

Every Ontario lawyer of my generation will remember that the text-book instance of *Damnum absque injuria* was the erection of a Market near to another without violation of legal right; here there was *injuria*, but the amount of *damnum* was not determined.

²⁴ Of course, the boy, the heir of the deceased William, was to be called upon to make good the donation of dower by his ancestor—being under age he "*non potest*." This, Agnes the widow of William Baker (Pistor), found to her sorrow in T. T., 5 Jo., (1203), when her son who should have been her warrantor, was "*filiaster ejus*."

²⁵ The name is variously spelled "*Kelloc*," "*Kellac*," "*Kellec*"; the modern orthography is generally "*Kellogg*" but "*Kellock*," "*Killock*," "*Kellick*," &c., are sometimes found.

Memo: I should add that the husband did not have it all his own way always. We read in the *Curia Regis Rolls* of a case in Michaelmas Term, 5 John (1203), the following:—

Norh'—*Robertus de Wivill' petit versus Willelmum de Ferendon' servitia que facere debet de libero tenemento quod de eo tenet in Farendon', quod est de maritagio Amiable uxoris sue; et Willelmus petit considerationem curie utrum debeat ei inde respondere, desicut tenementum illud dicit esse maritagium uxoris sue, ea absente, et desicut non nominatur' in brevi. Consideratum est quod non respondeat. Querat allud breve si voluerit.*"

Northampton. Robert de Wyville sues William de Ferendon for services which he ought to make concerning a free tenement which he holds of him in Ferendon which is the maritagium of Amiable his wife and William asks a judgment of the Court whether he should respond to him therein inasmuch as he says that that tenement is the maritagium of his wife she being absent and inasmuch as she is not mentioned in the writ.

It is considered that he is not to reply.

Let him seek another writ if he wishes.

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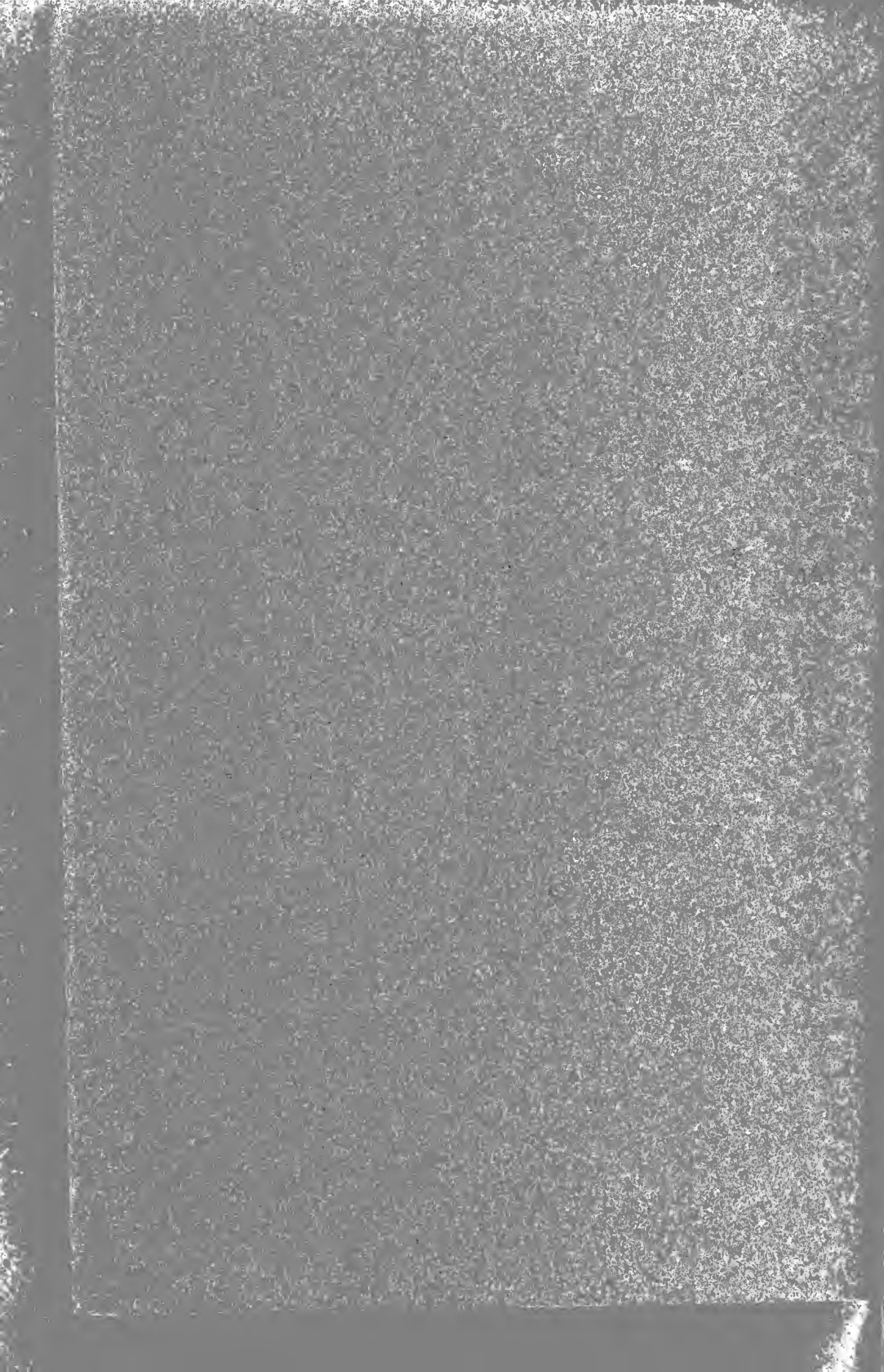
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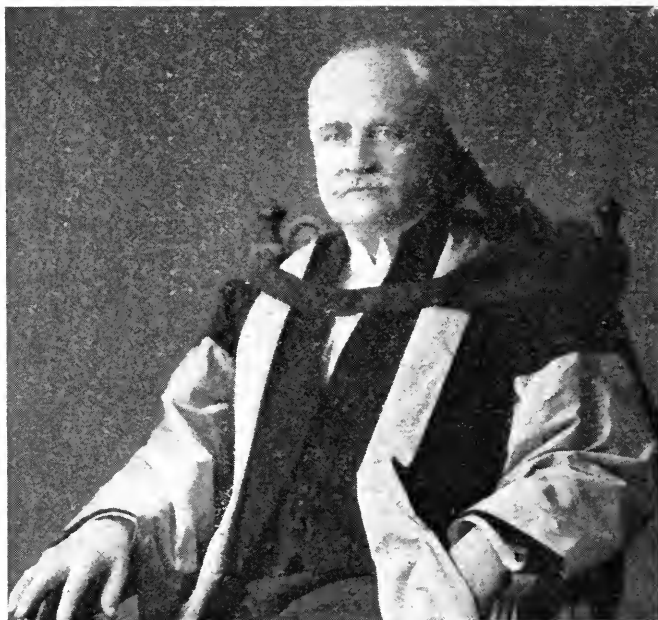
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HON. WILLIAM RENWICK RIDDELL
LL.D., D.C.L., &c.
Justice of the Supreme Court of Ontario

The Constitution of Nebraska, With an Occasional Comparison

The Honorable William Renwick Riddell, Supreme Court of Ontario

It is always a pleasure for me to meet my American brethren and especially upon occasions like the present. It has been my very great privilege to meet and address many State Bar Associations as well as the American Bar Association, and also many American Universities. While I have often travelled further for such meetings, this is the first time I have come so far West. My pleasure in meeting my Nebraska brethren is not less than in meeting those of Maine or of Georgia — we are all one family. Being all of one family it is interesting for each of us to know how the others live, how they are governed or govern themselves, to compare his own institutions with those of his brothers.

“Comparisons are odious” is a common saying — and it is true if the intention is odious or the object is to make odious either of the persons or things compared. But comparison may be most useful — it is the method of all true science and is productive of true knowledge and real advance.

In any comparison I may make, I have no desire to magnify and glorify or to minify and depreciate but simply to state facts as I understand them. I do not wish to offend, but I shall not flatter. Nor have I a drop of missionary blood in me to urge or so much as to suggest a change in this State — every people has the form of government it deserves, every free people the government it desires, and when the people of Nebraska want a change, no doubt they can and will effect it — at all events, they do not require any advice from me.

One who is not an American — and while I am American and proud of it, I am not an American — has in studying an American Constitution, the enormous advantage that, as he knows, it means what it says (except, perhaps, in a Constitutional Amendment or two — say the Fifteenth or, possibly, the Eighteenth). In our British unwritten Constitution method, we not infrequently do not. For example, the King, George V, is styled King by the Grace of God when everyone knows, he knows and is proud of it, that he is King by grace of an Act of Parliament — he had indeed a predecessor who lost his head metaphor-

ically, with the notion that he was King by the Grace of God and then lost his head in grim reality at Whitehall when he lived up to his belief. Another predecessor lost his throne in 1688 for indulging in the same outworn idea. Even in our own times the King has a cousin who thought that he had his throne by the Grace of God, and I need not say what happened to him.

We style the King, Defender of the Faith, because his much-married predecessor, Henry VIII, obtained the title from the Pope for defending the Roman Catholic Faith from the attacks of Martin Luther — while George V by law must be a Protestant.

We retain the old form and revolutionize the spirit — even in small things, the Gentleman Usher of the Black Rod wears a tab on the back of his coat though he has long ceased to wear a bagwig. But, then, I have known an American to wear buttons on the back of his coat though he has no sword belt to hold up or coat tails to button back — while the braid slit or the buttons on his sleeve did not indicate a reversible cuff.

Not that we cannot change if a change is thought advisable — as I have been speaking of the title of the King, an example may be taken from his title. During the latter half of the Nineteenth Century it was more and more recognized that Canada had lost her Colonial status — she owed no allegiance to England, to the United Kingdom of Great Britain and Ireland or to the people of the British Isles. We were much in the condition desired by the American Colonies in 1774 as described in the Petition to the King by the General Congress of October 26, 1774. "We wish not a diminution of the Prerogative nor do we solicit the grant of any new right in our favor. Your Royal authority over us and our connection with Great Britain we shall always carefully and zealously endeavor to support and maintain." We were, like these Colonists, "filled with sentiments of duty to Your Majesty and of affection to our parent state." But we had gone further — we had no grievances, and there was no attempt by King or Minister to interfere with our conduct of our own affairs. "We were permitted to enjoy in quiet the inheritance left us by our forefathers." We had no Imperial Taxation to be defended by a modern Dr. Johnson as no Tyranny — we felt as did the General Congress, July 6, 1775, that we could assure "our friends and fellow subjects in any part of the Empire . . . that we mean not to dis-

solve that union which has so long and so happily subsisted between us."

We could not, indeed, go quite the length of the Congress in the Address to the People of Great Britain of October 31, 1774. Some two-sevenths of us being Catholics and we Protestants liking them, we could hardly characterize their religion as one which "dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world."

Other parts of the British Empire were in substantially the same case as Canada — Australia, New Zealand, etc.

We acknowledged allegiance to Queen Victoria and she after becoming Empress of India was not troubled in her old age with a further change. But when she was succeeded by her son, no time was lost — it was recognized that a monarch "of the United Kingdom of Great Britain and Ireland, King . . . Emperor of India" was not therefore King of Canada and the other self governing parts of the Empire outside of the British Isles. These were consulted and it was, in 1901, determined to change the title so as to style his Majesty, King "of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas" (1).

While we can change a time honoured form for sentimental or other reasons, we are not inclined to do so: and consequently a great part of our Constitution is misleading to a non Briton and some may be characterized by the irreverent as camouflage.

Your Constitutions struck from the anvil, *uno ictu*, are not misleading, and even a Canadian has grounds for his faith that he can understand them.

He has the further ground in the knowledge that your Nebraska Constitution is not wholly of native manufacture. The ultimate origin of your Constitution as of mine is to be sought in the fens and marshes of the north-western part of Europe where the hardy and warlike Angles and Jutes lived the independent life of the free-man and alone of all the tribes refused to bow the knee to the Imperial Mistress of the World who sat on the throne and wielded the sceptre on the banks of the Tiber.

The same people with the same views of freedom lived and fought for centuries in the Island in the North Sea: they had a King, a succession of Kings; and when in the course of time, the King forgot his duty to his subjects, he had a sharp reminder at Runnymede — there on that

June day over seven hundred years ago, the principles were established which, elaborated and adapted to varying circumstances, are the foundation of every free Constitution in the English speaking world.

Changing circumstances, and it became necessary to enunciate a Bill of Rights — changing circumstances, and it became necessary to remind another King that subjects will stand only so much kingly rule by a Declaration of Independence. But these looked back to Magna Carta as to a parent — and drew their inspiration therefrom.

And pervading everything everywhere was the Common Law of England, the customs of the free people, declared and systematized by those most familiar with it.

Pass we over the generalities of the first section of the Nebraska Constitution — the truths therein contained being not less important because stated in general terms — derived from the Declaration of Independence, the most splendid and most successful propaganda the world has ever seen.

Sec. 2 says there shall be no slavery — William Cowper singing about the time the Independence of the United States was acknowledged, said

Slaves cannot breathe in England: if their lungs

Receive our air, that moment they are free:

They touch our country and their shackles fall (2) And from the yellow leaves of old Lofft and the State Trials, (3) we hear the solemn voice of the majestic Mansfield two years before the Declaration of Independence, saying:

“The trade in slaves is authorized by the laws and customs of Virginia and Jamaica — there they are goods and chattels, and as such saleable and sold . . . it is so odious that nothing can be suffered to support it but positive law . . . I cannot say this . . . is allowed . . . by the law of England: and therefore *the black must be discharged.*”

It required decades of anguish and the death of thousands of valiant and patriotic men before Lincoln could say: “the black *must* be discharged” — but when the “must” could and did come, it meant “must,” then and forever. (4)

Section 3. No person shall be deprived of life, liberty, or property, without due process of law.

Listen to Magna Carta: in Cap. XXXIX, we read: “Nullus liber homo capiatur, vel imprisonetur, aut dis-seisiatur, aut utlagetur, aut exuletur, aut aliquo modo

destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parum suorum vel per legem terra."

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

As the great Blackstone (5) truly says: "It protected every individual (6) of the nation in the free enjoyment of his life, his liberty and his property unless declared to be forfeited by the judgment of his peers or the law of the land."

Section 4 is a modern conception — at the time of the Revolution, "everywhere except in Pennsylvania, to be a Catholic was to cease to possess full civil rights and privileges" (7). And in many parts of the Thirteen Colonies "a Protestant family ran a fearful risk in harbouring a Romanist" (8). Only in the Province of Quebec was there full religious tolerance. Now all that intolerance has passed away, no religious test is required as a qualification for any office, and no one finds difficulty in being nominated or elected because of his creed or want of it or does he?

Section 5. The truth of a statement is a good defense to a civil action in libel. This always was the Common Law (9). In Criminal prosecutions, it required a Statute to enable the jury to deal with anything but the publication of the alleged libel (10) — but the ruling of the Judges made legislation necessary and it was made in 1792.

Section 6. "The right of trial by jury shall remain inviolate."

What says Magna Carta? We have seen the language of Cap. XXXIX which has generally been taken to ensure trial by jury. We must admit that the language has been stretched too far: at the time of Magna Carta, one's peers, "pares," were those of the same condition and station, crown tenants, tenants of mesne lords, Jews, marchers, etc. (11). But the principle was there — the essence that a man should have a fair trial by lay tribunal which would understand his ways, thoughts and life. We in Ontario have got far away from the idea that the "Jury is the Palladium of liberty and justice." The Jury, of course, never did interfere with the Equity jurisdiction of the Court of Chancery; but we have got so far now, our people have such confidence in the competency, common sense and impart-

iality of their Judges now, that except in a very few kinds of cases, quasi-criminal, like libel, slander, crim. con., etc., any litigant who wishes a trial by jury must serve notice accordingly and the trial judge has an absolute unappealable discretion to try all except those kinds of cases without a jury. And so far the heavens have not fallen: but trial without a jury seems to grow in popularity, saving as it does an enormous amount of time and wind. In jury cases, in the Civil Courts ten may find a verdict.

In criminal cases except some of the more serious such as murder which must be tried by a jury (with an unanimous verdict) the accused has the option of being tried by a Judge or a Jury—in the vast majority of cases the former is preferred.

Section 7 prohibits the General Warrant, the principle of which was denounced by the House of Commons in 1766 (13) and which had been declared illegal the year before by the Courts (14).

Section 10 is the Common Law—we in Canada have modified it as mentioned above (Sec. 7) so far as to give the accused an option in most cases.

Section 11 giving an accused the right to defend by Counsel is a deviation from the Common Law which by a rule which, as Blackstone (15) truly says, “seems to be not all of a piece with the rest of the humane treatment of prisoners by the English law,” refused to anyone charged with Treason or Felony the assistance of Counsel except in matter of law. In cases of High Treason, Counsel to the number of two were permitted the accused as early as 1695 (16). Constitutional Amendment VI provided for the assistance of Counsel (17) in every defense but it was not till 1836 that this right was fully recognized in England (18).

A speedy public trial—what says Magna Carta? “Nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.” We will sell to no man, to no man deny or delay justice or right—the clause to which our Canadian murderers appeal if they are not hanged within a year of the deed committed.

And at the Common Law in general offences could be inquired into as well as tried only in the county where they were committed (19).

Section 11. No person shall be convicted of Treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

In the year 1695, the Parliament of England enacted that after March 25, 1696, no person be indicted tried or attainted of High Treason but by and upon the oaths of and testimony of two lawful witnesses either both to one or one of them to one and the other to another overt act of the same Treason unless the party indicted shall willingly without violence in open court confess the same or stand mute or refuse to plead (20).

And so particular were the Courts on any criminal trial, that they would not allow the accused to be in irons during his trial unless it were necessary for safety's sake.

Section 15. "All penalties shall be proportioned to the nature of the offense" is a general statement. "No conviction shall work corruption of blood or forfeiture of estate." The reason of the Common Law rule of corruption of blood and forfeiture for crime is usually found in the the feudal system but it ultimately depends on the greed of the superior and the desire to terrorize any possible offender by the thought that his family would suffer by his crime.

Corruption of blood with escheat, Blackstone hoped might soon disappear (21) but while a little relief was granted in 1814 (22) it was not until 1870 that it disappeared from the English criminal law (23). I cannot say that there is any significance in the fact that the Act giving the rule its *coup de grace* came into force on the Fourth of July.

Section 15 further provides that no one shall be transported out of the State for any offense committed therein.

Again we go to Magna Carta cap. XXXIX: "Nullus liber homo . . . exuletur . . . nisi per legale iudicium parium suorum vel per legem terrae." Coke says: "By the law of the land no man can be exiled or banished out of his native country but either by authority of Parliament or in case of abjuration for felony . . . the King cannot send any subject of England against his will to serve him out of the realm, for that should be an exile and he should *perdere patriam*." (24)

Transportation for crime did not enter English law until 1597 when a Statute of Elizabeth was enacted to banish "rogues dangerous to the inferiour sort of people . . . as will not be reformed of their roguish kind of life." (25)

America was to be blessed with banished North-country Moss-troopers under an Act of Charles II, passed in 1666

(26): two years before this, i. e., in 1664, an Act was passed for the banishment for seven years to any of His Majesty's foreign Plantations except Virginia and New England of persons convicted the third time of holding religious meetings not in accordance with the Church of England (27). There were other special banishing Statutes, e. g., against the Quakers, but the first general Banishment Act was not passed till 1768 (28).

Section 16. "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed." and Section 21. "The property of no person shall be taken or damaged for public use without just compensation therefor," show the great regard for vested rights always shown by American Constitutions.

In the British systems we decline to bind our hands or the hands of our successors: in a recent case (29) I said: "It alarms some who have been taught that private rights are secure under our system, and amazes those who have a written constitution ensuring them, to learn that in matters of private rights our Legislature is supreme, free and unfettered."

"A Dartmouth College case decision would be impossible in a Province which formed the University of Toronto; and the Province of Ontario could not be visited with a judgment such as that in *Fletcher v. Peck* (1810), 6 Cranch 87, 136.

"In *Florence Mining Co. v. Cobalt Mining Co.* (1908), 18 O. L. R. 275, I stated the merest truism, though perhaps in novel language and with unaccustomed plainness, when I said: 'The Legislature within its jurisdiction can do anything that is not naturally impossible, and it is restrained by no rule, human or divine. If it be that the plaintiff acquired any rights . . . the Legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body" (p. 279). I placed my judgment squarely and solely upon what I conceived to be the undoubted power of the Legislature of the Province. The Court of Appeal, while holding that the plaintiff had not rights to take away, yet found no fault with the statement of law and held the Act, complained of as confiscatory, to be valid (pp. 292, 293). So, too, in the Judicial Committee (1910) 43 O. L. R. 474, at p. 476, their Lordships saw "no reason to differ from the conclusion of the Courts below." I think then that it

is too clear for argument that the Legislature has the power to interfere with vested rights so far as property within the Province is concerned, whether these rights be in respect of land or personalty, contractual or otherwise.

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"In *Smith v. City of London* (1909) 20 O. L. R., 133, it was held that the Legislature might take away a right of action even in a case already begun: in *Re Goodhue* (1872), 19 Gr. 366, and *Re Hammond* (1921), 51 O. L. R., 149, rights under wills were held to be validly affected by the action of the Legislature, the former under special, the latter under general legislation.

"A sufficiently good working rule, disregarding antiquated formulae and looking at facts, is that all property, real or personal, within Ontario, is at the disposal of the people of Ontario — it is thought best for the people that property shall be in the hands of individual persons, corporations, etc., but upon the implied condition that if thought best for the people it may be taken away and if thought best given to another. As two millions of people cannot act together, provision is made for representation in an Assembly — and these representatives decide on all such matters."

The assent of His Majesty is given by his personal representative: In *Re Initiative and Referendum Act*, (1919) A. C. 935 — and it is, in this Province at least, as unthinkable that it should be refused as that the King should exercise his theoretical power of vetoing a bill passed by the House of Parliament at Westminster — a power dead as and with Queen Anne.

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"Supervisory power indeed exists in the Dominion — for the sake of the good of the people of the whole Dominion, the Dominion may within a fixed time disallow any Act of the Legislature of the Province.

"The so-called 'confiscatory power' of the Province, or rather the blunt statement of it, has alarmed some who hanker after written formulae in formal terminology. But the British Constitution' (at least in that regard) is satisfactory to those who live in a country where it prevails.

"How this power is to be exercised rests in the conscience of the Legislature, and the Court has no jurisdiction in the premises."

The same fear of the democracy which is indicated in this section 21 appears in the provision in the Constitution of 1787 for the election of President of the United States.

The Constitution of the United States was framed by men who feared the wild passions of the mobility — great importance was attached by the framers of the Constitution to the interposition of the electoral college between the passions and prejudices of the indiscriminating multitude of voters and the high office of President. They feared that if the Legislature should elect a President it would be the work of intrigue, of cabal and of faction, it would be like the election of a Pope by the conclave of Cardinals and that real merit would rarely be the title to the appointment. (So said Gouveneur Morris, *loquendo et arguendo*.) Election by the people was liable to the most obvious and striking objections; they would be led by a few active and designing men (so Pickney of South Carolina) and it would be unnatural to refer the choice of Chief Magistrate to the people as it would be to refer a trial of colours to a blind man. (Mason of Virginia who knew his people). A popular election would be radically vicious; the ignorance of the people would put it in the power of one set of men dispersed through the Union and acting in concert to delude the people into any appointment. (So Gerry not yet mandering.)

So the Fathers determined that the appointment of President should be left to electors. These, of course, would be men of high standing and clear judgment, not filled with party spirit or influenced by regard for any man; they would feel the very great responsibility cast upon them and would anxiously canvass the merits of all natural born citizens of the United States who had attained the age of 35 years and had been for 14 years residents of the United States and they would vote for those best qualified for the high offices of President; he who received the most votes would become President and he who received the next greatest number Vice-President. And thus there would be no intrigue, no cabal, no faction, the people would not be led by a few active and designing men, no one set of men, senators or others, acting in concert could determine the appointment, and real merit would be the sole title to the office.

The selection of these electors being thus of the most serious importance, the citizens of each state would, of course, examine with the greatest care into the past his-

tory, the ability, clearness of vision, soundness of judgment, uprightness and candour of the prominent citizens, to see who should be entrusted with the grave responsibility of acting for them in the selection of their future four year Monarch.

Everyone knows how it turns out in fact: as soon as an elector is chosen everyone knows how he is going to vote and he votes accordingly — if he did not he would deserve to be shot as a traitor to his constituents. This illustrates the comparative unimportance of the form it is the spirit which is important. The letter killeth and the spirit giveth life. Private property is as safe with us as with you or we should not have the millions of American capital invested in Canada which we have although we could confiscate it tomorrow. We are reasonably honest and not absolute fools — if a Canadian may venture to say so — and in every free country, the people will have their way in the long run.

Sec. 17. The military shall be in strict subordination to the civil power. It was the strict subordination of the Army and Navy to the Civil Power, the centuries old and traditional policy of England, which saved the World in the Great War — had the Civil Power given way to the Military crying aloud for rigid enforcement of blockade in Europe, the United States and Britain would certainly have quarreled — it was the mastery of the Military Power in Germany which brought into action the unlimited U-boat campaign and consequent defeat of Germany. Had Britain and she exchanged policies, Germany at the worst would have had a stalemate — at the best she might have been Mistress of the World, and the Man of Potsdam, the Man of Destiny.

In the Legislative field there are some matters calling for remark.

Section 1 makes the Legislature bicameral. That is the traditional English way — the Chapter-house in Westminster Abbey was too small to hold all the members of the early Parliaments and so they had to divide into two — like will to like and those of the same rank went together: Knights of the Shire and Burgess were left to themselves as Commons while their superiors in rank were Lords. And so the theory grew up of the need of two Houses to correct each other's errors — or aggravate them.

When the Dominion of Canada was formed in 1867 (30) the Dominion took two Houses, the Senate and the House of Commons: three of the four Provinces (corresponding to your States) also took two Houses — Ontario accepted

only one, a Legislative Assembly. One of the three abolished her Upper House leaving only two Provinces Quebec and Nova Scotia with the traditional blessing of a bicameral Legislature: of the nine Province of the Dominion three, (1) Ontario, (2) Alberta and (3) Saskatchewan never had a second House, (4) British Columbia abolished hers before entering Confederation: (5) Prince Edward abolished hers the same year she entered, (6) Manitoba after six years' experience of hers got rid of it in 1876 and (7) New Brunswick in 1891. So of our nine Provinces, seven manage to worry along with one House: and it has not been found that legislation suffers thereby in quantity or quality — the only demerits the system seems to have are the smaller crop of Honourables and the lack of a comfortable home for wornout politicians.

Occasionally there springs up an agitation for the abolition of the Senate of the Dominion but like the weather there is never anything done about it.

We have no Initiative and Referendum — such a system has been declared unconstitutional (31) (in the American sense of the word) when the question was tested in the Courts (32).

The outstanding difference between your country and mine in respect of legislative power is that you forbid certain kinds of legislation: while we allot the Legislature of the Province certain objects of legislation leaving the remainder to the Dominion and then say to each "Keep within your limits but within the limits go as far as you like." In Dominion or Province there is power to do anything not naturally impossible.

But considerable as is the difference in the Legislative field the real and substantial difference is in the Executive.

Here I must remind you that we have in form a Monarchical Government — A Constitution similar in principle to that of the United Kingdom (33) We have a King, the King "of the British Dominions beyond the Seas" (34). He cannot be with us and consequently we have His representative in Dominion and in each Province: in the Dominion selected in form by the Administration at Westminster alone but in fact after consultation with the Administration at Ottawa.

In the Province, the Royal Representation is selected by the Administration at Ottawa.

This Royal Representative has a great appearance of power like the King in London (35) and has as little —

it is generally a matter of perfect indifference who or what he is so long as he is presentable.

The real Executive is the Ministry, the "Administration."

At least as often as every five years, a General Election is held for the House of Commons; the party having a majority of members in the House of Commons have their leader, selected formally or informally but always known, made Prime Minister: he selects his cabinet from among the members of one House or the other (in practice some of both); they are put in charge of the departments — the Ministry must stand or fall as a unit and not individually — in form the Ministers are responsible to the Governor General, in fact they need care nothing for him, they are responsible to the House of Commons alone — so long as they can control a majority in that House, they remain in power; when they lose it they get out and give place to a Ministry who can. Every cent of money spent, every official act, appointment, etc., must be accounted for to the House.

That is Responsible Government which has been in force in Canada for three quarters of a century.

In the Provinces the Lieutenant Governor plays the same role as the Governor General in the Dominion — they all sign on the dotted line.

No Governor has any right to have politics — he cannot talk politics, inaugurate or advocate legislation or any public measure; in all public matters, in every official speech, he must employ only the words put in his mouth and do the acts directed by his Ministry. They are responsible to the people through their elected representatives.

It will be seen that in the United States the President and the Governor have powers analogous to that of the older Kings of England — the Cabinet, the Advisors of the President are responsible to him as the ancient Advisors of the Kings to the Kings. We have the new system in which the Representatives of the People are the judges of the fitness of the Ministers and the propriety of their conduct — our Governors are so called on the *lucus a non lucendo* principle, because they do not govern.

May I be allowed to quote some language of my own contained in a lecture at Yale University.

"Paley, when speaking of a view held by some writers concerning the Constitution of England, says: 'These points are wont to be approached with a kind of awe:

they are represented to the mind as principles of the constitution, settled by our ancestors, and being settled, to be no more committed to innovation or debate, as foundations never to be stirred, as the terms and conditions of the social compact to which every citizen of the State has engaged his fidelity by virtue of a promise which he cannot now recall.' Is not that the point of view, the feeling of the Americans? Paley adds, 'Such reasons have no place in our system.'

The framers of the Constitution of the United States have used every endeavor to ward off what they consider the worst of all governments, an unbalanced democracy which is supposed to be necessarily pregnant with a democratical tyranny (I use the words of Erskine) thinking (to use the words of Locke) 'that the people being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humour of the people, is to expose it to certain ruin.' It is in the power of the people to change the Constitution indeed, but not at once — and the 'sober second thought' is what is so often spoken of and so often appealed to. Is it always certain that the first thought is wrong: and the second thought right?

With Burke I say 'If you ask me what a free government is, I answer, That it is what the people think so, and that they and not I are the natural, lawful and competent judges of this matter.'

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It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count?

In your land as in mine the Government and legislators respond pretty well to public sentiment — a little more quickly, a little more slowly — both lands get the government they deserve.

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An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land; neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native — unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people: we have lived together in peace with an international boundary of thousands of miles, for more than a century (may that peace be eternal), our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common, we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity."

NOTES

(1) See the Statute (1901) 1 Edward VII, c. 15, (Imp): Royal Proclamation, November 4, 1901: Canada Gazette, 1901, p. 1192. When in 1907, the former title Colonial Conference was changed to Imperial Conference, the old "Colony" appellation for the Dominions fell into disuse or obsolete and is used now only by Americans who think with Senator Lenroot that Canada will do as she is told.

(2) *The Task*, written 1783-1785.

(3) *Somerset v. Stewart* (1774) Lofft, 1:20 St. Tr. 1: Campbell's *Lives of the Chief Justices*, Vol. II, p. 419.

(4) In my Province we got rid of future slavery in 1793, throughout the whole British world it disappeared in 1833.

(5) *Commentaries*, IV, 424.

(6) Coke points out: 2 *Inst.*, 45; that the protection extends even to the quasi slave, the villein, except as against his lord "for they are free against all men saving against their lord." See 1 *Inst.* sec. 189.

(7) Guilday: *The Life and Times of John Carroll*, N. Y., 1922, pp. 20, 21.

(8) Shea: *History of the Catholic Church in the United States*, N. Y., 1890, p. 498.

(9) Blackstone's *Commentaries*, III, 125, Apparently the defense is less extensive than at the Common Law, being in this Section limited to publications "with good motives and for justifiable ends."

(10) Fox's Act (1792) 32 George III, c. 60, Any way Fox was a friend of the American cause.

(11) See the discussion in McKechnie's *Magna Carta*. Glasgow, 1905, pp. 456 sqq. An admirable book in every way.

(13) April 22, 25, 1766: 16 *Parliamentary History* (Hansard).

(14) See *Leach v. Money* and *Entick v. Carrington* (1765) 19 State Trials, 1001, 1030 and cf. *Wilkes v. Wood*, (1763) do. do., 1153.

(15) *Commentaries*, IV, 349.

(16) (1695) 7 William III, c. 3, extended to Impeachments in 1747, 20 Geo. II, c. 30.

(17) (1876) *Dodge v. The People*, 4 Nebr. 220, at p. 227.

(18) (1836) 6, 7 Will. IV, c. 114 (Imp.); cf. in Canada (1841) 4, 5, Vic. c. 24, s. 9 (Can.) and (1857) 20 Vic. c. 27, s. 4. (Can.).

(19) So says Maxwell J. in *Dodge v. The People* (1876) 4 Nebr. 220, at pp. 225, 226, citing Blackstone's *Commentaries*, IV, 305.

(20) (1695) 7 William and Mary, c. 3.

(21) See the first (Oxford) edition, 1769, of the *Commentaries*, IV, 388.

(22) (1814) 54 George III, c. 145. (Imp.): cf. (1869) 32, 33, Vic. c. 29, s. 55 (Can.): (1833) 4 Will. IV, c. 1, (U. C.).

(23) (1870) 33, 34 Vic. c. 23 (Imp.): cf. (1892) 55, 56, Vic. c. 29, s. 965 (Dom.)

(24) Coke's *Institutes*, II, p. 47.

(25) (1597) 39 Eliz., c. 4, s. 4. If they returned from banishment "to parts across the seas" they were hanged.

(26) (1666) 18 Car. II, c. 3 extended till June 24, 1751, by 17 Geo. II, c. 40.

(27) (1664) 16 Car. II, c. 4.

(28) (1768) 8 Geo. III, c. 15: (1779) 19 George III, c. 74, it disappeared in (1857) 20, 21 Vic., c. 3, s. 2 (Imp.)

(29) *Township of Sandwich East v. Union Natural Gas Co.* (1924) 56 Ontario Law Reports, 399, at pp. 403, 404.

(30) By the British North America Act (1867) 30, 31 Vic., c. 31 (Imp.)—in form a Statute of the Parliament at Westminster, in fact an agreement drawn by Canadian Statesmen.

(31) In the Blumenthal Lectures delivered by me at Columbia University in 1923, I used the following language (pp. 1, 2.): "The word 'Constitution' has a different connotation in American and in Canadian (i.e., British) usage. Speaking somewhat generally—in the United States, the 'Constitution' is a written document containing so many letters, words and sentences, which authoritatively and without appeal dictates what shall and what shall not be done; in Canada, the Constitution is the totality of the principles more or less vaguely and generally

stated upon which we think the people should be governed. In Canada anything unconstitutional is wrong, however legal it may be; in the United States anything unconstitutional is illegal, however right and even advisable it may be; in the United States anything unconstitutional is illegal, in Canada to say that a measure is unconstitutional rather suggests that it is legal, but inadvisable."

(32) *Re The Initiative and Referendum Act*, (1916) 27 Manitoba Law Reports, 1: (1919) Appeal Cases (Privy Council) 935.

(33) B. N. A. Act (1867), Preamble.

(34) This expression is constantly misunderstood — and yet no Virginian, no one from the "Old Dominion," at least, should fail to understand it. The connotation is not "territory beyond the Seas owned by the people of the British Isles" — that connotation would have answered in the Old British Empire built on the model of the Roman Empire in which the outlying Provinces and Colonies existed for the centre part, the Metropolis. That Old British Empire was rent in twain by the American Revolution and disappeared to make room for the New British Empire, the British Commonwealth of Nations — in which each part of the Empire exists primarily for itself. The connotation now is "territory the Dominion of a British people who live and own it." For example not Englishmen or Scotsmen or Irishmen or these all together own or have dominion over Canada — it is Canadians. We have shaken off the Colonial status and are not going back.

(35) You may perhaps remember the somewhat irreverent description given of the position of the King by my late friend Theodore Roosevelt (*valde defendus*) — he thought it like "the leadership of the Four Hundred coupled with the Speakership of the Senate." Later on I understand he moved to amend by leaving all the words after "Hundred." Roosevelt was not wholly just.

The Constitution of Nebraska

With an Occasional Comparison

HONORABLE
WILLIAM RENWICK RIDDELL

Address before Nebraska State Bar Association
December 29, 1925

The Constitution of Nebraska, With an Occasional Comparison

The Honorable William Renwick Riddell, Supreme Court of
Ontario

Address before the Nebraska State Bar Association, Omaha,
Nebraska, December 29, 1925

It is always a pleasure for me to meet my American brethren and especially upon occasions like the present. It has been my very great privilege to meet and address many State Bar Associations as well as the American Bar Association, and also many American Universities. While I have often travelled further for such meetings, this is the first time I have come so far West. My pleasure in meeting my Nebraska brethren is not less than in meeting those of Maine or of Georgia — we are all one family. Being all of one family it is interesting for each of us to know how the others live, how they are governed or govern themselves, to compare his own institutions with those of his brothers.

“Comparisons are odious” is a common saying — and it is true if the intention is odious or the object is to make odious either of the persons or things compared. But comparison may be most useful — it is the method of all true science and is productive of true knowledge and real advance.

In any comparison I may make, I have no desire to magnify and glorify or to minify and depreciate but simply to state facts as I understand them. I do not wish to offend, but I shall not flatter. Nor have I a drop of missionary blood in me to urge or so much as to suggest a change in this State — every people has the form of government it deserves, every free people the government it desires, and when the people of Nebraska want a change, no doubt they can and will effect it — at all events, they do not require any advice from me.

One who is not an American — and while I am American and proud of it, I am not an American — has in studying an American Constitution, the enormous advantage that, as he knows, it means what it says (except, perhaps, in a Constitutional Amendment or two — say the Fifteenth or, possibly, the Eighteenth). In our British unwritten Constitution method, we not infrequently do not. For example, the King, George V, is styled King by the Grace of God when everyone knows, he knows and is proud

of it, that he is King by grace of an Act of Parliament — he had indeed a predecessor who lost his head metaphorically, with the notion that he was King by the Grace of God and then lost his head in grim reality at Whitehall when he lived up to his belief. Another predecessor lost his throne in 1688 for indulging in the same outworn idea. Even in our own times the King has a cousin who thought that he had his throne by the Grace of God, and I need not say what happened to him.

We style the King, Defender of the Faith, because his much-married predecessor, Henry VIII, obtained the title from the Pope for defending the Roman Catholic Faith from the attacks of Martin Luther — while George V by law must be a Protestant.

We retain the old form and revolutionize the spirit — even in small things, the Gentleman Usher of the Black Rod wears a tab on the back of his coat though he has long ceased to wear a bagwig. But, then, I have known an American to wear buttons on the back of his coat though he has no sword belt to hold up or coat tails to button back — while the braid slit or the buttons on his sleeve did not indicate a reversible cuff.

Not that we cannot change if a change is thought advisable — as I have been speaking of the title of the King, an example may be taken from his title. During the latter half of the Nineteenth Century it was more and more recognized that Canada had lost her Colonial status — she owed no allegiance to England, to the United Kingdom of Great Britain and Ireland or to the people of the British Isles. We were much in the condition desired by the American Colonies in 1774 as described in the Petition to the King by the General Congress of October 26, 1774. "We wish not a diminution of the Prerogative nor do we solicit the grant of any new right in our favor. Your Royal authority over us and our connection with Great Britain we shall always carefully and zealously endeavor to support and maintain." We were, like these Colonists, "filled with sentiments of duty to Your Majesty and of affection to our parent state." But we had gone further — we had no grievances, and there was no attempt by King or Minister to interfere with our conduct of our own affairs. "We were permitted to enjoy in quiet the inheritance left us by our forefathers." We had no Imperial Taxation to be defended by a modern Dr. Johnson as no Tyranny — we felt as did the General Congress, July 6,

1775, that we could assure "our friends and fellow subjects in any part of the Empire . . . that we mean not to dissolve that union which has so long and so happily subsisted between us."

We could not, indeed, go quite the length of the Congress in the Address to the People of Great Britain of October 31, 1774. Some two-sevenths of us being Catholics and we Protestants liking them, we could hardly characterize their religion as one which "dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world."

Other parts of the British Empire were in substantially the same case as Canada — Australia, New Zealand, etc.

We acknowledged allegiance to Queen Victoria and she after becoming Empress of India was not troubled in her old age with a further change. But when she was succeeded by her son, no time was lost — it was recognized that a monarch "of the United Kingdom of Great Britain and Ireland, King . . . Emperor of India" was not therefore King of Canada and the other self governing parts of the Empire outside of the British Isles. These were consulted and it was, in 1901, determined to change the title so as to style his Majesty, King "of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas" (1).

While we can change a time honoured form for sentimental or other reasons, we are not inclined to do so: and consequently a great part of our Constitution is misleading to a non Briton and some may be characterized by the irreverent as camouflage.

Your Constitutions struck from the anvil, *uno ictu*, are not misleading, and even a Canadian has grounds for his faith that he can understand them.

He has the further ground in the knowledge that your Nebraska Constitution is not wholly of native manufacture. The ultimate origin of your Constitution as of mine is to be sought in the fens and marshes of the north-western part of Europe where the hardy and warlike Angles and Jutes lived the independent life of the free-man and alone of all the tribes refused to bow the knee to the Imperial Mistress of the World who sat on the throne and wielded the sceptre on the banks of the Tiber.

The same people with the same views of freedom lived and fought for centuries in the Island in the North Sea: they had a King, a succession of Kings; and when in the

course of time, the King forgot his duty to his subjects, he had a sharp reminder at Runnymede — there on that June day over seven hundred years ago, the principles were established which, elaborated and adapted to varying circumstances, are the foundation of every free Constitution in the English speaking world.

Changing circumstances, and it became necessary to enunciate a Bill of Rights — changing circumstances, and it became necessary to remind another King that subjects will stand only so much kingly rule by a Declaration of Independence. But these looked back to Magna Carta as to a parent — and drew their inspiration therefrom.

And pervading everything everywhere was the Common Law of England, the customs of the free people, declared and systematized by those most familiar with it.

Pass we over the generalities of the first section of the Nebraska Constitution — the truths therein contained being not less important because stated in general terms — derived from the Declaration of Independence, the most splendid and most successful propaganda the world has ever seen.

Sec. 2 says there shall be no slavery — William Cowper singing about the time the Independence of the United States was acknowledged, said

Slaves cannot breathe in England: if their lungs

Receive our air, that moment they are free:

They touch our country and their shackles fall (2) And from the yellow leaves of old Lofft and the State Trials, (3) we hear the solemn voice of the majestic Mansfield two years before the Declaration of Independence, saying:

“The trade in slaves is authorized by the laws and customs of Virginia and Jamaica — there they are goods and chattels, and as such saleable and sold . . . it is so odious that nothing can be suffered to support it but positive law . . . I cannot say this . . . is allowed . . . by the law of England: and therefore *the black must be discharged.*”

It required decades of anguish and the death of thousands of valiant and patriotic men before Lincoln could say: “the black *must* be discharged” — but when the “must” could and did come, it meant “must,” then and forever. (4)

Section 3. No person shall be deprived of life, liberty, or property, without due process of law.

Listen to Magna Carta: in Cap. XXXIX, we read:

"Nullus liber homo capiatur, vel imprisonetur, aut dis-
seisiatur, aut utlagetur, aut exuletur, aut aliquo modo
destruatur, nec super eum ibimus, nec super eum mittemus,
nisi per legale iudicium parum suorum vel per legem
terra."

No freeman shall be arrested, or detained in prison, or
deprived of his freehold, or outlawed, or banished or in
any way molested; and we will not set forth against him,
nor send against him, unless by the lawful judgment of
his peers and by the law of the land.

As the great Blackstone (5) truly says: "It protected
every individual (6) of the nation in the free enjoyment
of his life, his liberty and his property unless declared to
be forfeited by the judgment of his peers or the law of the
land."

Section 4 is a modern conception — at the time of the
Revolution, "everywhere except in Pennsylvania, to be a
Catholic was to cease to possess full civil rights and pri-
vileges" (7). And in many parts of the Thirteen Colon-
ies "a Protestant family ran a fearful risk in harbouring
a Romanist" (8). Only in the Province of Quebec was
there full religious tolerance. Now all that intolerance has
passed away, no religious test is required as a qualification
for any office, and no one finds difficulty in being nomi-
nated or elected because of his creed or want of it or does he?

Section 5. The truth of a statement is a good defense
to a civil action in libel. This always was the Common
Law (9). In Criminal prosecutions, it required a Statute
to enable the jury to deal with anything but the publication
of the alleged libel (10) — but the ruling of the Judges
made legislation necessary and it was made in 1792.

Section 6. "The right of trial by jury shall remain in-
volute."

What says Magna Carta? We have seen the language of
Cap. XXXIX which has generally been taken to ensure
trial by jury. We must admit that the language has been
stretched too far: at the time of Magna Carta, one's peers,
"pares," were those of the same condition and station,
crown tenants, tenants of mesne lords, Jews, marchers, etc.
(11). But the principle was there — the essence that a
man should have a fair trial by lay tribunal which would
understand his ways, thoughts and life. We in Ontario have
got far away from the idea that the "Jury is the Palladium
of liberty and justice." The Jury, of course, never did in-
terfere with the Equity jurisdiction of the Court of Chan-

cery; but we have got so far now, our people have such confidence in the competency, common sense and impartiality of their Judges now, that except in a very few kinds of cases, quasi-criminal, like libel, slander, crim. con., etc., any litigant who wishes a trial by jury must serve notice accordingly and the trial judge has an absolute unappealable discretion to try all except those kinds of cases without a jury. And so far the heavens have not fallen: but trial without a jury seems to grow in popularity, saving as it does an enormous amount of time and wind. In jury cases, in the Civil Courts ten may find a verdict.

In criminal cases except some of the more serious such as murder which must be tried by a jury (with an unanimous verdict) the accused has the option of being tried by a Judge or a Jury—in the vast majority of cases the former is preferred.

Section 7 prohibits the General Warrant, the principle of which was denounced by the House of Commons in 1766 (13) and which had been declared illegal the year before by the Courts (14).

Section 10 is the Common Law—we in Canada have modified it as mentioned above (Sec. 7) so far as to give the accused an option in most cases.

Section 11 giving an accused the right to defend by Counsel is a deviation from the Common Law which by a rule which, as Blackstone (15) truly says, “seems to be not all of a piece with the rest of the humane treatment of prisoners by the English law,” refused to anyone charged with Treason or Felony the assistance of Counsel except in matter of law. In cases of High Treason, Counsel to the number of two were permitted the accused as early as 1695 (16). Constitutional Amendment VI provided for the assistance of Counsel (17) in every defense but it was not till 1836 that this right was fully recognized in England (18).

A speedy public trial—what says Magna Carta? “Nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.” We will sell to no man, to no man deny or delay justice or right—the clause to which our Canadian murderers appeal if they are not hanged within a year of the deed committed.

And at the Common Law in general offences could be inquired into as well as tried only in the county where they were committed (19).

Section 11. No person shall be convicted of Treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

In the year 1695, the Parliament of England enacted that after March 25, 1696, no person be indicted tried or attainted of High Treason but by and upon the oaths of and testimony of two lawful witnesses either both to one or one of them to one and the other to another overt act of the same Treason unless the party indicted shall willingly without violence in open court confess the same or stand mute or refuse to plead (20).

And so particular were the Courts on any criminal trial, that they would not allow the accused to be in irons during his trial unless it were necessary for safety's sake.

Section 15. "All penalties shall be proportioned to the nature of the offense" is a general statement. "No conviction shall work corruption of blood or forfeiture of estate." The reason of the Common Law rule of corruption of blood and forfeiture for crime is usually found in the the feudal system but it ultimately depends on the greed of the superior and the desire to terrorize any possible offender by the thought that his family would suffer by his crime.

Corruption of blood with escheat, Blackstone hoped might soon disappear (21) but while a little relief was granted in 1814 (22) it was not until 1870 that it disappeared from the English criminal law (23). I cannot say that there is any significance in the fact that the Act giving the rule its *coup de grace* came into force on the Fourth of July.

Section 15 further provides that no one shall be transported out of the State for any offense committed therein.

Again we go to Magna Carta cap. XXXIX: "Nullus liber homo . . . exuletur . . . nisi per legale iudicium parium suorum vel per legem terrae." Coke says: "By the law of the land no man can be exiled or banished out of his native country but either by authority of Parliament or in case of abjuration for felony . . . the King cannot send any subject of England against his will to serve him out of the realm, for that should be an exile and he should *perdere patriam*." (24)

Transportation for crime did not enter English law until 1597 when a Statute of Elizabeth was enacted to banish "rogues dangerous to the inferiour sort of people

... as will not be reformed of their roguish kind of life.”
(25)

America was to be blessed with banished North-country Moss-troopers under an Act of Charles II, passed in 1666 (26): two years before this, i. e., in 1664, an Act was passed for the banishment for seven years to any of His Majesty's foreign Plantations except Virginia and New England of persons convicted the third time of holding religious meetings not in accordance with the Church of England (27). There were other special banishing Statutes, e. g., against the Quakers, but the first general Banishment Act was not passed till 1768 (28).

Section 16. “No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed.” and Section 21. “The property of no person shall be taken or damaged for public use without just compensation therefor,” show the great regard for vested rights always shown by American Constitutions.

In the British systems we decline to bind our hands or the hands of our successors: in a recent case (29) I said: “It alarms some who have been taught that private rights are secure under our system, and amazes those who have a written constitution ensuring them, to learn that in matters of private rights our Legislature is supreme, free and unfettered.”

“A Dartmouth College case decision would be impossible in a Province which formed the University of Toronto; and the Province of Ontario could not be visited with a judgment such as that in *Fletcher v. Peck* (1810), 6 Cranch 87, 136.

“In *Florence Mining Co. v. Cobalt Mining Co.* (1908), 18 O. L. R. 275, I stated the merest truism, though perhaps in novel language and with unaccustomed plainness, when I said: ‘The Legislature within its jurisdiction can do anything that is not naturally impossible, and it is restrained by no rule, human or divine. If it be that the plaintiff acquired any rights . . . the Legislature had the power to take them away. The prohibition ‘Thou shalt not steal’ has no legal force upon the sovereign body” (p. 279). I placed my judgment squarely and solely upon what I conceived to be the undoubted power of the Legislature of the Province. The Court of Appeal, while holding that the plaintiff had not rights to take away, yet found no fault with the statement of law and held the Act,

complained of as confiscatory, to be valid (pp. 292, 293). So, too, in the Judicial Committee (1910) 43 O. L. R. 474, at p. 476, their Lordships saw "no reason to differ from the conclusion of the Courts below." I think then that it is too clear for argument that the Legislature has the power to interfere with vested rights so far as property within the Province is concerned, whether these rights be in respect of land or personalty, contractual or otherwise.

* * * * *

"In *Smith v. City of London* (1909) 20 O. L. R., 133, it was held that the Legislature might take away a right of action even in a case already begun: in *Re Goodhue* (1872), 19 Gr. 366, and *Re Hammond* (1921), 51 O. L. R., 149, rights under wills were held to be validly affected by the action of the Legislature, the former under special, the latter under general legislation.

"A sufficiently good working rule, disregarding antiquated formulae and looking at facts, is that all property, real or personal, within Ontario, is at the disposal of the people of Ontario — it is thought best for the people that property shall be in the hands of individual persons, corporations, etc., but upon the implied condition that if thought best for the people it may be taken away and if thought best given to another. As two millions of people cannot act together, provision is made for representation in an Assembly — and these representatives decide on all such matters."

The assent of His Majesty is given by his personal representative: In *Re Initiative and Referendum Act*, (1919) A. C. 935 — and it is, in this Province at least, as unthinkable that it should be refused as that the King should exercise his theoretical power of vetoing a bill passed by the House of Parliament at Westminster — a power dead as and with Queen Anne.

* * * * *

"Supervisory power indeed exists in the Dominion — for the sake of the good of the people of the whole Dominion, the Dominion may within a fixed time disallow any Act of the Legislature of the Province.

"The so-called 'confiscatory power' of the Province, or rather the blunt statement of it, has alarmed some who hanker after written formulae in formal terminology. But the British 'Constitution' (at least in that regard) is

satisfactory to those who live in a country where it prevails.

"How this power is to be exercised rests in the conscience of the Legislature, and the Court has no jurisdiction in the premises."

The same fear of the democracy which is indicated in this section 21 appears in the provision in the Constitution of 1787 for the election of President of the United States.

The Constitution of the United States was framed by men who feared the wild passions of the mobility — great importance was attached by the framers of the Constitution to the interposition of the electoral college between the passions and prejudices of the indiscriminating multitude of voters and the high office of President. They feared that if the Legislature should elect a President it would be the work of intrigue, of cabal and of faction, it would be like the election of a Pope by the conclave of Cardinals and that real merit would rarely be the title to the appointment. (So said Gouveneur Morris, *loquendo et arguendo*.) Election by the people was liable to the most obvious and striking objections; they would be led by a few active and designing men (so Pickney of South Carolina) and it would be unnatural to refer the choice of Chief Magistrate to the people as it would be to refer a trial of colours to a blind man. (Mason of Virginia who knew his people). A popular election would be radically vicious; the ignorance of the people would put it in the power of one set of men dispersed through the Union and acting in concert to delude the people into any appointment. (So Gerry not yet mandering.)

So the Fathers determined that the appointment of President should be left to electors. These, of course, would be men of high standing and clear judgment, not filled with party spirit or influenced by regard for any man; they would feel the very great responsibility cast upon them and would anxiously canvass the merits of all natural born citizens of the United States who had attained the age of 35 years and had been for 14 years residents of the United States and they would vote for those best qualified for the high offices of President; he who received the most votes would become President and he who received the next greatest number Vice-President. And thus there would be no intrigue, no cabal, no faction, the people would not be led by a few active and designing men, no one set of men, senators or others, acting in concert could determine the

appointment, and real merit would be the sole title to the office.

The selection of these electors being thus of the most serious importance, the citizens of each state would, of course, examine with the greatest care into the past history, the ability, clearness of vision, soundness of judgment, uprightness and candour of the prominent citizens, to see who should be entrusted with the grave responsibility of acting for them in the selection of their future four year Monarch.

Everyone knows how it turns out in fact: as soon as an elector is chosen everyone knows how he is going to vote and he votes accordingly — if he did not he would deserve to be shot as a traitor to his constituents. This illustrates the comparative unimportance of the form; it is the spirit which is important. The letter killeth and the spirit giveth life. Private property is as safe with us as with you or we should not have the millions of American capital invested in Canada which we have although we could confiscate it tomorrow. We are reasonably honest and not absolute fools — if a Canadian may venture to say so — and in every free country, the people will have their way in the long run.

Sec. 17. The military shall be in strict subordination to the civil power. It was the strict subordination of the Army and Navy to the Civil Power, the centuries old and traditional policy of England, which saved the World in the Great War — had the Civil Power given way to the Military crying aloud for rigid enforcement of blockade in Europe, the United States and Britain would certainly have quarreled — it was the mastery of the Military Power in Germany which brought into action the unlimited U-boat campaign and consequent defeat of Germany. Had Britain and she exchanged policies, Germany at the worst would have had a stalemate — at the best she might have been Mistress of the World, and the Man of Potsdam, the Man of Destiny.

In the Legislative field there are some matters calling for remark.

Section 1 makes the Legislature bicameral. That is the traditional English way — the Chapter-house in Westminster Abbey was too small to hold all the members of the early Parliaments and so they had to divide into two — like will to like and those of the same rank went together: Knights of the Shire and Burgess were left to themselves

as Commons while their superiors in rank were Lords. And so the theory grew up of the need of two Houses to correct each other's errors — or aggravate them.

When the Dominion of Canada was formed in 1867 (30) the Dominion took two Houses, the Senate and the House of Commons: three of the four Provinces (corresponding to your States) also took two Houses — Ontario accepted only one, a Legislative Assembly. One of the three abolished her Upper House leaving only two Provinces Quebec and Nova Scotia with the traditional blessing of a bicameral Legislature: of the nine Provinces of the Dominion three, (1) Ontario, (2) Alberta and (3) Saskatchewan never had a second House, (4) British Columbia abolished hers before entering Confederation: (5) Prince Edward abolished hers the same year she entered, (6) Manitoba after six years' experience of hers got rid of it in 1876 and (7) New Brunswick in 1891. So of our nine Provinces, seven manage to worry along with one House: and it has not been found that legislation suffers thereby in quantity or quality — the only demerits the system seems to have are the smaller crop of Honourables and the lack of a comfortable home for wornout politicians.

Occasionally there springs up an agitation for the abolition of the Senate of the Dominion but like the weather there is never anything done about it.

We have no Initiative and Referendum — such a system has been declared unconstitutional (31) (in the American sense of the word) when the question was tested in the Courts (32).

The outstanding difference between your country and mine in respect of legislative power is that you forbid certain kinds of legislation: while we allot the Legislature of the Province certain objects of legislation leaving the remainder to the Dominion and then say to each "Keep within your limits but within the limits go as far as you like." In Dominion or Province there is power to do anything not naturally impossible.

But considerable as is the difference in the Legislative field the real and substantial difference is in the Executive.

Here I must remind you that we have in form a Monarchical Government — A Constitution similar in principle to that of the United Kingdom (33) We have a King, the King "of the British Dominions beyond the Seas" (34). He cannot be with us and consequently we have His representative in Dominion and in each Province: in the

Dominion selected in form by the Administration at Westminster alone but in fact after consultation with the Administration at Ottawa.

In the Province, the Royal Representation is selected by the Administration at Ottawa.

This Royal Representative has a great appearance of power like the King in London (35) and has as little — it is generally a matter of perfect indifference who or what he is so long as he is presentable.

The real Executive is the Ministry, the “Administration.”

At least as often as every five years, a General Election is held for the House of Commons; the party having a majority of members in the House of Commons have their leader, selected formally or informally but always known, made Prime Minister: he selects his cabinet from among the members of one House or the other (in practice some of both); they are put in charge of the departments — the Ministry must stand or fall as a unit and not individually — in form the Ministers are responsible to the Governor General, in fact they need care nothing for him, they are responsible to the House of Commons alone — so long as they can control a majority in that House, they remain in power; when they lose it they get out and give place to a Ministry who can. Every cent of money spent, every official act, appointment, etc., must be accounted for to the House.

That is Responsible Government which has been in force in Canada for three quarters of a century.

In the Provinces the Lieutenant Governor plays the same role as the Governor General in the Dominion — they all sign on the dotted line.

No Governor has any right to have politics — he cannot talk politics, inaugurate or advocate legislation or any public measure; in all public matters, in every official speech, he must employ only the words put in his mouth and do the acts directed by his Ministry. They are responsible to the people through their elected representatives.

It will be seen that in the United States the President and the Governor have powers analogous to that of the older Kings of England — the Cabinet, the Advisors of the President are responsible to him as the ancient Advisors of the Kings to the Kings. We have the new system in which the Representatives of the People are the judges of the fitness of the Ministers and the propriety of their

conduct — our Governors are so called on the *lucus a non lucendo* principle, because they do not govern.

May I be allowed to quote some language of my own contained in a lecture at Yale University.

“Paley, when speaking of a view held by some writers concerning the Constitution of England, says: ‘These points are wont to be approached with a kind of awe: they are represented to the mind as principles of the constitution, settled by our ancestors, and being settled, to be no more committed to innovation or debate, as foundations never to be stirred, as the terms and conditions of the social compact to which every citizen of the State has engaged his fidelity by virtue of a promise which he cannot now recall.’ Is not that the point of view, the feeling of the Americans? Paley adds, ‘Such reasons have no place in our system.’

The framers of the Constitution of the United States have used every endeavor to ward off what they consider the worst of all governments, an unbalanced democracy which is supposed to be necessarily pregnant with a democratical tyranny (I use the words of Erskine) thinking (to use the words of Locke) ‘that the people being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humour of the people, is to expose it to certain ruin.’ It is in the power of the people to change the Constitution indeed, but not at once — and the ‘sober second thought’ is what is so often spoken of and so often appealed to. Is it always certain that the first thought is wrong: and the second thought right?

With Burke I say ‘If you ask me what a free government is, I answer, That it is what the people think so, and that they and not I are the natural, lawful and competent judges of this matter.’

* * * * *

It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count.

In your land as in mine the Government and legislators respond pretty well to public sentiment — a little more quickly, a little more slowly — both lands get the government they deserve.

* * * * *

An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is

entering a foreign or a strange land; neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people: we have lived together in peace with an international boundary of thousands of miles, for more than a century (may that peace be eternal), our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common, we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.

NOTES

(1) See the Statute (1901) 1 Edward VII, c. 15, (Imp): Royal Proclamation, November 4, 1901: Canada Gazette, 1901, p. 1192. When in 1907, the former title Colonial Conference was changed to Imperial Conference, the old "Colony" appellation for the Dominions fell into disuse or became obsolete and is used now only by Americans who think with Senator Lenroot that Canada will do as she is told.

(2) *The Task*, written 1783-1785.

(3) *Somerset v. Stewart* (1774) Lofft, 1:20 St. Tr. 1: Campbell's *Lives of the Chief Justices*, Vol. II, p. 419.

(4) In my Province we got rid of future slavery in 1793, throughout the whole British world it disappeared in 1833.

(5) *Commentaries*, IV, 424.

(6) Coke points out: 2 *Inst.*, 45; that the protection extends even to the quasi slave, the villein, except as against his lord "for they are free against all men saving against their lord." See 1 *Inst.* sec. 189.

(7) Guilday: *The Life and Times of John Carroll*, N. Y., 1922, pp. 20, 21.

(8) Shea: *History of the Catholic Church in the United States*, N. Y., 1890, p. 498.

(9) Blackstone's *Commentaries*, III, 125, Apparently the defense is less extensive than at the Common Law, being in this Section limited to publications "with good motives and for justifiable ends."

(10) Fox's Act (1792) 32 George III, c. 60, Any way Fox was a friend of the American cause.

(11) See the discussion in McKechnie's *Magna Carta*. Glasgow, 1905, pp. 456 *seq.* An admirable book in every way.

(13) April 22, 25, 1766: 16 *Parliamentary History* (Hansard).

(14) See *Leach v. Money* and *Entick v. Carrington* (1765) 19 State Trials, 1001, 1030 and cf. *Wilkes v. Wood*, (1763) *do. do.*, 1153.

(15) *Commentaries*, IV, 349.

(16) (1695) 7 William III, c. 3, extended to Impeachments in 1747, 20 Geo. II, c. 30.

(17) (1876) *Dodge v. The People*, 4 Nebr. 220, at p. 227.

(18) (1836) 6, 7 Will. IV, c. 114 (Imp.); cf. in Canada (1841) 4, 5, Vic. c. 24, s. 9 (Can.) and (1857) 20 Vic. c. 27, s. 4. (Can.).

(19) So says Maxwell J. in *Dodge v. The People* (1876) 4 Nebr. 220, at pp. 225, 226, citing Blackstone's *Commentaries*, IV, 305.

(20) (1695) 7 William and Mary, c. 3.

(21) See the first (Oxford) edition, 1769, of the *Commentaries*, IV, 388.

(22) (1814) 54 George III, c. 145. (Imp.): cf. (1869) 32, 33, Vic. c. 29, s. 55 (Can.): (1833) 4 Will. IV, c. 1, (U. C.).

(23) (1870) 33, 34 Vic. c. 23 (Imp.): cf. (1892) 55, 56, Vic. c. 29, s. 965 (Dom.)

(24) Coke's *Institutes*, II, p. 47.

(25) (1597) 39 Eliz., c. 4, s. 4. If they returned from banishment "to parts across the seas" they were hanged.

(26) (1666) 18 Car. II, c. 3 extended till June 24, 1751, by 17 Geo. II, c. 40.

(27) (1664) 16 Car. II, c. 4.

(28) (1768) 8 Geo. III, c. 15: (1779) 19 George III, c. 74, it disappeared in (1857) 20, 21 Vic., c. 3, s. 2 (Imp.)

(29) *Township of Sandwich East v. Union Natural Gas Co.* (1924) 56 Ontario Law Reports, 399, at pp. 403, 404.

(30) By the British North America Act (1867) 30, 31 Vic., c. 31 (Imp.)—in form a Statute of the Parliament at Westminster, in fact an agreement drawn by Canadian Statesmen.

(31) In the Blumenthal Lectures delivered by me at Columbia University in 1923, I used the following language (pp. 1, 2.): "The word 'Constitution' has a different connotation in American and in Canadian (i.e., British) usage. Speaking somewhat generally—in the United

States, the 'Constitution' is a written document containing so many letters, words and sentences, which authoritatively and without appeal dictates what shall and what shall not be done; in Canada, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed. In Canada anything unconstitutional is wrong, however legal it may be; in the United States anything unconstitutional is illegal, however right and even advisable it may be; in the United States anything unconstitutional is illegal, in Canada to say that a measure is unconstitutional rather suggests that it is legal, but inadvisable."

(32) *Re The Initiative and Referendum Act*, (1916) 27 Manitoba Law Reports, 1: (1919) Appeal Cases (Privy Council) 935.

(33) B. N. A. Act (1867), Preamble.

(34) This expression is constantly misunderstood — and yet no Virginian, no one from the "Old Dominion," at least, should fail to understand it. The connotation is not "territory beyond the Seas owned by the people of the British Isles" — that connotation would have answered in the Old British Empire built on the model of the Roman Empire in which the outlying Provinces and Colonies existed for the centre part, the Metropolis. That Old British Empire was rent in twain by the American Revolution and disappeared to make room for the New British Empire, the British Commonwealth of Nations — in which each part of the Empire exists primarily for itself. The connotation now is "territory the Dominion of a British people who live and own it." For example not Englishmen or Scotsmen or Irishmen or these all together own or have dominion over Canada — it is Canadians. We have shaken off the Colonial status and are not going back.

(35) You may perhaps remember the somewhat irreverent description given of the position of the King by my late friend Theodore Roosevelt (*valde defendus*) — he thought it like "the leadership of the Four Hundred coupled with the Speakership of the Senate." Later on I understand he moved to amend by leaving out all the words after "Hundred." Roosevelt was not wholly just.



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Among Practitioners.



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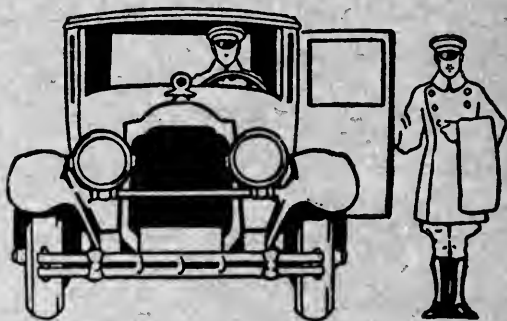
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of ownership of the granted premises and the necessity for giving notice to the owners. The statute in question does not require either the city or the owner of the granted premises to do anything. It is purely permissive. It provides that if the city, through its Board of Estimate and Apportionment, passes a certain resolution, such act "shall be considered to be a consent by the city of New York to a release and discharge of the owners so to be assessed from any and every covenant and obligation as to paving, repaving, repairing and maintaining contained in the water grant under which said premises are held." It also provides that if the property owner either files a written consent or pays the assessment, he consents to the modification of his obligation. Without the aid of the statute the city is without power to enforce covenants of this character by the levying of an assessment (citing *Matter of L. I. R.R. v. Hylan*, 240 N. Y. 199). It could recover the cost only in an action. The statute thus gives the more speedy and effective remedy of assessment, which creates a lien upon the land, but imposes the condition that if this remedy be availed of and the assessment paid the owner is relieved of future liability. Under the Act the consent of both parties to the modification of the contract is provided for. A statute which merely provides a method by which the parties may modify their agreement if they so choose, leaving both parties free to act or refrain from action, does not impair the obligation of the contract (citing *Gilfilland v. Union Canal Co.*, 109 U. S. 401). *Butterly v. Miller*, 75 L. J. 1590, McGoldrick, J. (7-23-26).

WILLS.—The construction, validity and effect of a will probated in a foreign country, insofar as it affects the descent and alienation of real estate located in the state of New York, are controlled by the laws of this state (citing *Lowe v. Plainfield Trust Co.*, 215 N. Y. S. 50, 53). *Calleran v. Gallen*, 75 L. J. 1241, Faber, J. (6-18-26). The words "heirs at law" or "next of kin" used in a will refer primarily to those answering that description at the date of testator's death, unless a contrary intention appears (citing *Matter of Bump*, 234 N. Y. 60; *U. S. Trust Co. v. Taylor*, 193 A. D. 153, aff'd., 232 N. Y. 609; *Matter of White*, 213 A. D. 82). *Estate of Emile A. Thomas*, 75 L. J. 1088, Foley, S. (6-9-26). To the same effect are, *Estate of Thomas J. Briggs*, 75 L. J. 1303, Foley, S. (6-23-26); *Estate of William H. Aspinwall*, 75 L. J. 1015, O'Brien, S. (6-4-26).

LAWYERS AND LEGAL EVENTS

THE PROPOSED INCORPORATION OF THE BAR—ALSO A LETTER FROM MR. JUSTICE RIDDELL

From letters received by the REVIEW but as yet unpublished, bearing upon the proposed incorporation of the bar, those here presented are of sufficient value to warrant space in this issue.

Freeman Day, Esq., of Jenkins, Carpenter & Day, Bar Building, New York City, writes:

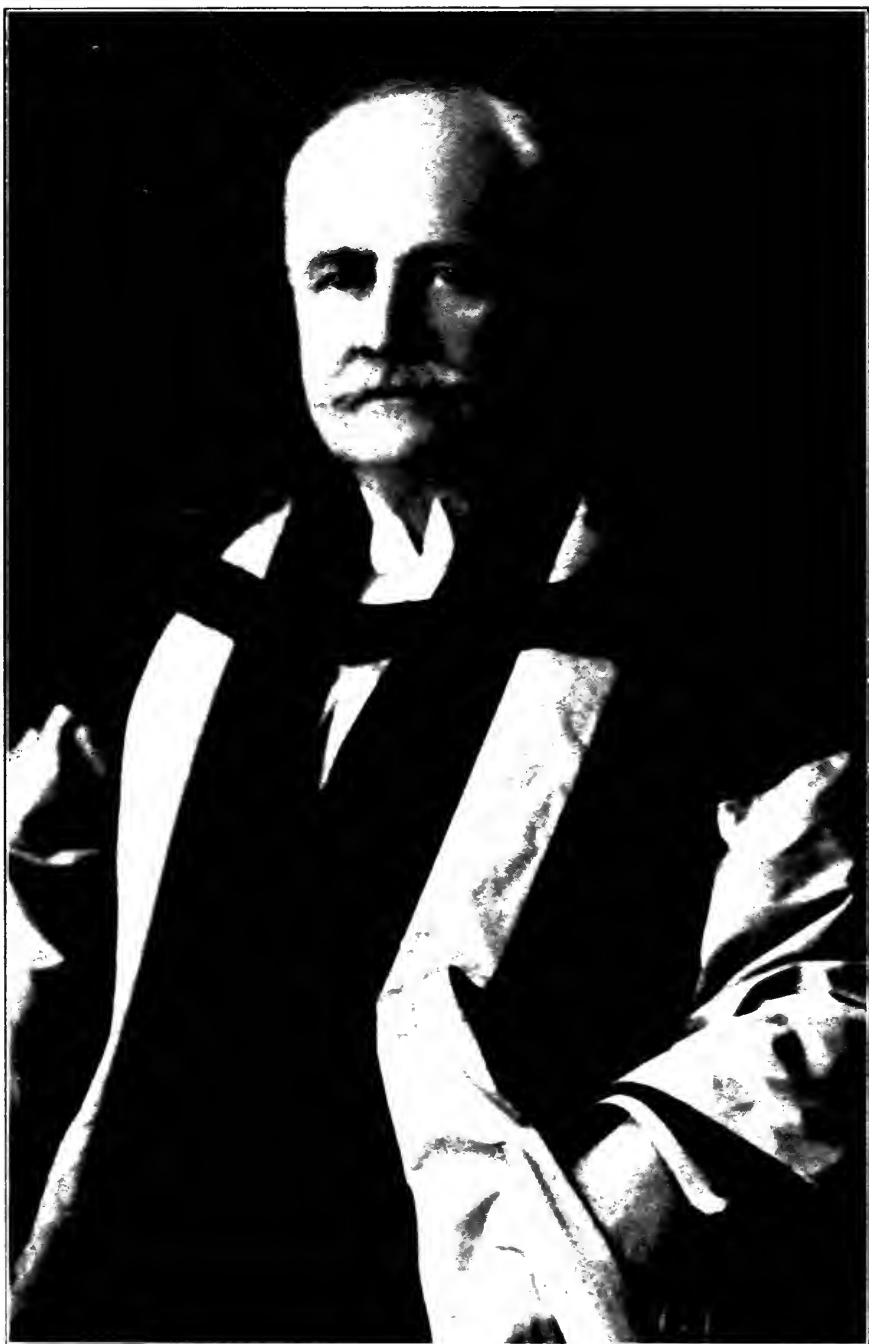
"I am in sympathy with the conclusions reached by the New York County Lawyers' Association and the Association of the Bar of the City of New York, both of which have gone on record as being opposed to the proposal. I cannot see that the incorporation of the bar would bring about any beneficial results in and of itself. It seems to me that the bar as a whole has suffered greatly from the admission to practice of large numbers of men who are qualified neither by education nor character for the practice of law as a profession and that this evil can only be cured by the adoption and enforcement of the highest standards of legal education and character as a requisite for admission to the bar. It seems to me that the incorporation of the bar as it now exists, which would have the effect of enfranchising in a formal organization a large number of men who ought not to be members of the bar at all, would tend to make more difficult the raising of the level of the bar as a whole."

George W. Reeves, Esq., of Watertown, New York, declares, concerning the incorporation of the bar:

"I am against it. I know of no corporate organization, membership or otherwise, in which the officers and directors do not possess considerable latitude and power, not only over the membership, but in expressing or assuming to express the aims and opinions of the organization. I prefer to be a free lawyer as against one controlled in any degree by other lawyers who may or may not be better than I."

One of the most interesting contributions to the present discussion has been made by Mr. Justice William Renwick Riddell, of the Appellate Division of the Supreme Court of the Province of Ontario. Mr. Justice Riddell, whose portrait we present in this issue, writes:

"In answer to your letter in which you ask me how I feel about the incorporation of the bar, I would say that in this Province the bar, by which I mean those who were practising law at the time, was, in 1797, formed by an Act of the legislature into the Law Society of Upper Canada, and that organization has existed from that time until the present, with ever increasing influence and usefulness. It received, in 1822, an Act of Incorporation



WILLIAM RENWICK RIDDELL

JUSTICE OF THE SUPREME COURT OF THE PROVINCE OF ONTARIO, APPELLATE DIVISION

MR. JUSTICE RIDDELL CONTRIBUTES AN INTERESTING LETTER TO THIS ISSUE OF THE REVIEW UPON THE LAW SOCIETY OF UPPER CANADA, INCORPORATED IN 1797, UNDER WHICH, TOGETHER WITH A SUPPLEMENTAL ACT OF INCORPORATION PASSED IN 1822, THE BAR OF THE PROVINCE OF ONTARIO HAS SATISFACTORILY FUNCTIONED AS A CORPORATE ENTITY FOR MORE THAN A HUNDRED YEARS



GEORGE HOPKINS BOND

OF THE NEW YORK BAR

SENIOR MEMBER OF THE WELL KNOWN FIRM OF BOND, SCHOENECK & KING, OF SYRACUSE, NEW YORK. AS A YOUNG LAWYER MR. BOND OCCUPIED THE RESPONSIBLE POSITION OF DISTRICT ATTORNEY OF ONONDAGA COUNTY, LATER BECOMING PRESIDENT OF THE NEW YORK STATE ASSOCIATION OF DISTRICT ATTORNEYS. MORE RECENTLY, MR. BOND HAS BEEN ACTIVE IN THE CONDUCT OF A LARGE AND LUCRATIVE CIVIL LAW PRACTICE, GIVING LIBERALLY, HOWEVER, OF HIS TIME TO BAR ASSOCIATION WORK.

MR. BOND IS NOW CHAIRMAN OF THE COMMITTEE OF THE NEW YORK STATE BAR ASSOCIATION UPON THE ORGANIZATION OF THE NEW YORK STATE BAR

of its Treasurer and Benchers, in order to hold property, but the Society in itself exists under the old Act of 1797. This Society consists of all the barristers of the Province and the students-at-law admitted into the Society. Every five years all the barristers by ballot elect thirty Benchers who form Convocation, and are the governing body of the Society. The Benchers also include certain *ex officio* members. The Benchers own and manage the law school. They lay down the curriculum, appoint dean, professors and examiners; they call to the bar, and the court has nothing to do with this function. When a Bencher of the Law Society of Upper Canada presents a person, man or woman, as having been called by the Law Society of Upper Canada, the court must necessarily recognize him or her as a barrister. The Benchers also lay down the curriculum and examine solicitors, and grant a certificate of fitness to be admitted as a solicitor upon the presentation of which to a judge in court, the party is admitted. The Benchers have full power of discipline, and exercise it with great care, and I may say with great success.

This method of governing a profession has proven so successful in our Province that it has been followed by the legislature in giving to the doctors, the dentists and the druggists a similar incorporation and similar powers. We have found it acts most admirably.

I do not know how it would succeed in your state although on my somewhat numerous visits to your bar associations, of which I am an honorary member, I have not seen a great deal of difference between your people and ours.

Yours very truly,

WILLIAM RENWICK RIDDELL"

Mr. Justice Riddell's brief history of the incorporation of the bar in the Province of Ontario, with the statement of the success with which the plan has worked out there, is perhaps one of the strongest arguments yet presented in favor of the incorporation of the state bar. The discussion will be continued in the pages of the REVIEW from time to time, the REVIEW believing the topic to be one of utmost importance to the bar of this state.

MOTORISTS AND HORSES ON THE HIGHWAY

Horses and horse-drawn vehicles, though now comparatively rare on the main highways of New York state, are not yet extinct, even though many motorists appear to feel that the motor car has the exclusive right to the roadway. But this is far from the fact. On the contrary, the New York Highway Law gives riders or drivers of horses express privileges and immunities, even allowing for horses of nervous dispositions. All that the rider or driver of such an animal need do is to raise his hand, somewhat after the manner of a traffic cop, whereupon the operator of the motor vehicle must bring it immediately to a stop, and if the horse appears much frightened or very ill at ease, the motor of the vehicle shall also be stopped.

The text of the Highway Law is as follows:

"A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading or driving a horse or horses or

other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal; provided that, in case such horse or animal appears badly frightened or the person operating such motor vehicle is so signaled to do, such person shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others. * * * Whenever a person operating a motor vehicle shall meet on a public highway any other person riding or driving a horse or horses or other draft animals or any other vehicle, the person so operating such motor vehicle shall seasonably turn the same to the right of the center of such highway so as to pass without interference. Any such person so operating a motor vehicle shall, on overtaking any such horse, draft animal or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left."

Every year a certain number of accidents occur to riders and drivers of horses by reason of the violation of these provisions of law by drivers of automobiles. Automobile drivers should, therefore, be made to understand their duties and obligations toward the riders or drivers of horses, and the latter should also understand what their rights are, to the end that personal injuries and property damage may be avoided.

TWO YOUNG LAWYERS DESIROUS OF FORMING NEW CONNECTIONS

From time to time during the past year or more, the editorial department of the REVIEW has been privileged to act as confidential intermediary between members of the bar wishing to form connections of a kind not to be obtained through the medium of newspaper advertisements. And it is a source of gratification to the editors that this wholly gratuitous service has resulted in some advantageous contacts.

Recently two communications, admirable in both form and content, have been received, which, omitting identifying particulars, are reproduced below.

One of our correspondents has been at the bar of this state for three years and during that time has apparently acquired a rather varied experience and made substantial progress. He thus describes himself and his desires:

Letter No. 1

"The unique opportunity afforded by your kind offer to act as confidential intermediary between members of the bar desirous of establishing new connections is one which seems too valuable to be overlooked.

Upon graduation, with the degree LL.B., *magna cum laude*, from a law school of good repute in my native state, Massachusetts, I entered the service of one of the trunk line railroads as managing clerk in its New York City legal department. During the three years I have worked for this company my salary has been twice increased.

My experience includes the usual details of practice and pleading, the

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THE INDIAN—*Ivan Swift*

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QUESTION: Is the woman mentioned in the following, the fur-trader Mme. La Framboise? The passage is in Margaret Fuller's *Summer on the Lakes in 1843*, p. 250: "The house where we lived belonged to the widow of a French trader, an Indian by birth, and wearing the dress of her country. She spoke French fluently, and was very ladylike in her manners. She is a great character among them. They were all the time coming to pay her homage, or to get her aid and advice; for she is, I am told, a shrewd woman of business. My companion carried about her sketch-book with her, and the Indians were interested when they saw her using her pencil, though less so than about the sunshade. This lady of the tribe wanted to borrow the sketches of the beach, with its lodges and wild groups, 'to show to the *savages*', she said."

WEDNESDAY evening, December 22, 1926, the Chippewa Historical Society held an open meeting at the Probate Court room in the Court House, in Sault Ste. Marie, for the purpose of observing the one hundredth anniversary of the organization of Chippewa County.

Judge Charles H. Chapman, president of the Society, presided, and addresses were made by Stanley Newton, Dr. Karl Christofferson and Judge Chapman gave the principal paper, a copy of which I am herewith enclosing. A resolution was adopted extending greetings to the Chippewa Historical Society to be presented at its meetings December 22, 2026, and at the passing of each century thereafter.

THE man who appears as "Madison", on p. 145 of the January 1927 Magazine, should be "Matteson", an editorial writer "who possessed a vocabulary of vituperative language unsurpassed", according to Mr. Frank Culver, 5 N. LaSalle St., Chicago.

“DETROIT was a haven for persecuted loyalists,” says William Renwick Riddell, Justice of the Supreme Court of Ontario, in a communication to the Editor.

“That Detroit as a whole remained loyal to the Crown during the American Revolution was most natural. Michigan had no legislature to be interfered with and was not taxed. That it was a haven for Loyalists is well known. In 5 Pennsylvania Archives, Philadelphia, 1853, p. 402, a state publication of great value, will be found copied the following Proclamation which speaks for itself:

Detroit, 24th June, 1777.

By virtue of the power and authority to me given by his Excellency Sr. Guy Carlton, Knight of the Bath, Governor of the province of Quebec, General and Commander in chief, &c., &c., &c.

I assure all such as are inclined to withdraw themselves from the Tyranny and oppression of the rebel committees and take refuge in this Settlement or any of the posts commanded by His Majesty's Officers shall be humanely treated, shall be lodged and victualled and such as are off. in arms and shall use them in defense of his majesty against rebels and Traitors till the extinction of this rebellion, shall receive pay adequate to their former stations in the rebel service, and all common men who shall serve during that period shall receive his majesty's bounty of two hundred acres of Land.

Given under my hand and seal

HENRY HAMILTON [SEAL]

Lieut. Govs Superintendent.

M. M. QUAIFE writes in the *Burton Historical Leaflet* for January about “Detroit and Early Chicago.”

“Chicago and Detroit are respectively the second and fourth cities of North America”, he says, “and the probability is strong that before many years their ranking will be second and third. Detroit is much the older city of the two, and historically their relation is that of mother and daughter. About three-quarters of a century ago, Chicago began to outstrip Detroit in population and commercial importance, a development which made her the wonder-city of the age; but for gen-

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WAGER OF BATTEL IN A. D. 1200

BY WILLIAM RENWICK RIDDELL¹

To one who, like me, approached the study of the Common Law through the gateway of the Civil Law, the method by which the right to land was determined in the early English law is a constant source of amazement.

From shortly after the Conquest (at the latest) until well within the reign of Henry Plantagenet the only method was the judicial duel. Henry, with the consent of his nobles or Parliament, gave to the tenant of land claimed by another in court the privilege of having the ownership determined by twelve recognitors; though for this privilege the tenant must pay a fee ('oblatum' or 'oblatio') to the King, generally the minimum half-mark (or 6s 8d).² Blackstone in his Commentaries on the Laws of England,³ gives a reasonably full and accurate account of the practice; but by his time it had become conventionalized (and almost obsolete).

The recent volume published in 1922 by His Majesty's Stationery Office, London, "*Curia Regis* Rolls of the reigns of Richard I and John preserved in the Public Records Office," contains contemporary records of proceedings in the *Curia Regis*, 1196-1201. From these records may be gathered the actual conduct of a "Wager of Battel."

1. The Wager of Battel might be waged in three cases: (1) in the Court Martial, i. e., the Court of Chivalry and Honor, (2) in appeals of felony, and (3) in writs of right. The *Curia Regis* had to do with only the last two. At that time, it must be remembered, the *Curia Regis* had not yet divided into permanent separate courts. Of the twenty cases of judicial duel mentioned in this volume, twelve are on writ of right and therefore civil, and eight are on appeals of felony and therefore criminal. While the writ of right could be and often was brought in the County Court or the Baron's Court,

1. [Justice of the Supreme Court of Ontario.]

2. "The law [at this period] is too hard upon a demandant. . . . Even if all goes swiftly, the tenant has enormous advantages. He can choose between two modes of trial. He can insist that the whole question of better right (involving, as it may, the nicest questions of law) shall be left all in one piece to the knights of the neighborhood. And then, if he fears their verdict, he can trust to the God of battles; he can force the demandant to a 'probatio divina,' which is as much to be dreaded as any 'probatio diabolica' of the canonists" (*Pollock & Maitland* "History" II 63).

3. Book III pp. 337 et seq.

there is no mention of the *tolt writ* to remove a plaintiff from Court Baron to County Court, and only one or two of the *pone writ* to remove from County Court to the King's Court.

Apparently the first proceeding in cases in the *Curia Regis* was for the demandant to sue out his writ of right, and to have the tenant summoned by the *vice-comes* (sheriff) of the county through "good summoners," to be present before the justices of the court on a day named. On the day mentioned, if the demandant and tenant both appeared either in person or by attorney,⁴ the demandant made his claim and offered to prove it by a man or one of several men whom he named.

The demandant might withdraw the claim. In that case he was 'in misericordia' (in mercy), and paid a fine to the King, generally half a mark ('*dimidium marcum*'), but sometimes more. Sometimes a litigant 'in misericordia' escaped altogether, e. g., an early entry tells us: "*Robertus in misericordia: puer est, condonatus est*" (Robert in mercy: he is a boy, he is excused). One example of a record will suffice; in Hilary Term, 10 Ric. I (1199),⁵ "Bedford: Robert Malherbe having a writ of novel disseisin against Simon de Bello Campo [Beauchamp] withdraws, in mercy. The fine is one mark."

If the claim was pressed, an entry such as this was made (the example is from Michaelmas Term 2 John, A. D. 1200):⁶

"Warwick: Henry de Ermenters demands against Geoffrey le Sauvage one military fee with appurtenances in Wooton [Leek] as his right and inheritance, as Isabella de Ermenters, grandmother of the said Henry, was seized of it as of right and of fee in the time of King Henry [the Second] father of our Lord the King by taking the esplees thereof to the value of one silver mark and more, and

4. The word "attorney" (*attornatus*) I find used only twice in the thousands of suits mentioned in these Rolls. The usual terminology is "Thomas filius Eustacii positus loco abbatisse de Winton" (Thomas Fitz Eustace put in the place of the Abbess of Winchester). There are hundreds of entries like the following: "Emma de Dunlege ponit loco suo Williamum de Rammescumbe versus Rogerum de Lega" (Emma de Dunlege puts in her place William of Rammescumbe against Roger of Leigh.)

5. "Bedef"—Robertus Malherbe portans breve de nova disseisina super Simone de Bello Campo retraxit se et posuit se, in misericordia. Misericordia est j marca."

6. "Warri"—Henricus de Ermenters petit versus Gaufridum de Salvag' feodum j militis cum pertinenciis in Witton' sicut jus suum et hereditatem, sicut illud unde Ysabella de Ermenterres avia ipsius Henrici saisita fuit ut de jure et de feodo tempore Henrici Regis patris domini regis capiendū inde esplecias ad valenciam j marci argenti et plus: et hoc offert probare per Alanum de Hekinton', qui hoc offert ut de visu suo. . . ." (Instead of the latter expression is sometimes found "qui hoc offert disracionare per corpus suum ut de visu et auditu. . . .") Ermenters or Ermenterres is the modern Armenters.

this he offers to prove by Alan of Hekinton, who offers the same as by seeing. . . ." (or "who offers to prove the same by his body as by sight and hearing. . . ."). Sometimes the witnesses are described as "free and lawful men" ('liberi et legales homines'); sometimes as the demandant's man or men ('hominem suum,' 'homines suos').

The tenant not infrequently craves a view of the land: that is always granted him, and the case is enlarged, generally until the justices in eyre come into the county. E. g., in the case mentioned above, "Gaufridus petit visum terre," Habeat. In adventu justiciariorum et interim fiat visus" (Geoffrey craves a view of the land. Let him have it. Till the coming of the justices and in the meantime let the view be had).

The reason for craving a view is sometimes given; e. g., 'quia habet inde plures terras' (because he has several lands there); or 'quia, ut dicit, plures terras habet in eodem suburbio' (because, as he says, he has several lands there in the same suburb [of Warwick]).

Sometimes the parties are accorded the right to come to an agreement, either on the spot or in the interim ('interim habent licentiam concordandi'); they paying a fee of 'dimidiam marcam' or more. If they do agree, the agreement is recorded and remains of record 'in perpetuam testimoniam,' and cannot thereafter be contradicted—this was the well-known "Fine."

The tenant may be ready and defends. E. g., Mabel de la Grave demanded against Avice of St. Quentin two hides of land, 'et hoc offert probare versus illam per Radulfum de Nor' qui hoc offert disracionare per corpus suum ut de visu et auditu' (and this she offers to prove against her by Ralph de Nor[olk], who offers to deraign the same by his body as of sight and hearing). But Avice is ready: 'Hawisia defendit jus suum per quendam hominem suum, scilicet Robertum Pistorem de Notingham vel per alium per quem debuerit' (Avice defends her right by a certain man of hers, namely, Robert Miller of Nottingham or by another by whom she ought). Sometimes the form is more extended, as this by Henry of Bedefunt [Bedfont] in Trinity Term, 1200: 'defendit totum jus suum per Willelmum liberum hominem suum vel per corpus suum proprium si de eo male contigerit' (defends his whole right by Wil-

7. It must be borne in mind that in very many if not most mediaeval Latin manuscripts, the genitive and dative singular and nominative and vocative plural of nouns, pronouns and adjectives of the first declension have the termination "e" not "ae"; cf. note 17 post.

liam his freeman or by his own body if any ills befalls William).⁸ These champions were sometimes hired persons ('conducticii').

2. And now all is set: 'Consideratum est quod duellum vadietur' (it is considered that battel should be waged). But the champions must find pledges that they will fight—"pledges of battel" as they were afterwards called; often two in number, but sometimes only one for each. In the women's suit mentioned above the pledges are named: 'Plegius Radulfi, Thomas de Terefeld: Plegius Roberti, Radulfus Nicholai' (Pledge of Ralph, Thomas of Terefeld: Pledge of Robert, Ralph Nicholson).

If the duel is intended to be fought at Westminster, a day is fixed for it by the court and a direction given; 'et tunc veniant armati' (and let them then appear armed). In later years the duels were apparently always fought at Westminster. But at this time they were generally fought in the county, either before the justices in eyre or in the County Court, in presence of at least four knights girt with their swords ('milites'); in that case the day was not (as a rule) fixed by the Curia Regis.

3. This, the regular course, might be interrupted in several ways. The *demandant* might not appear in court to make his demand. He was then 'in misericordia' and paid a fine, unless he claimed sickness as the cause ('de malo lecti') or some other valid excuse as broken bridges, etc. ('de malo veniendi')—sending an *essoigner* ('essoniator') to make the excuse. If this was accepted, he *essoigned* himself, and a new day might be given him. If there was any doubt, four knights⁹ were generally selected by the sheriff (by order of the court or on a writ sued out by his opponents) to visit him and see. The inspection was sometimes not made; but when the sick man got well, he came to court and asked to be allowed to

8. *Blackstone* "Commentaries" III Appendix No. 1 p. iv, gives the form which the proceeding ultimately took.

9. I find one curious instance, in Trinity Term 2 Joh. (1200): 'Staff'. Loquendum de vicecomite Staff' cui preceptum fuit ij vicibus facere visum de infirmitate Amirie uxoris Eborardi unde essoniavit se versus Rogerum le Gras; et non fecit; sed dua pauperes, non milites, venerunt qui dixerunt quod eis preceptum fuit simul cum aliis videre ipsam Amiriam' (Stafford. The King must be spoken to about the Sheriff of Stafford who had been twice ordered to make inspection concerning the sickness of Amiria wife of Everard when she *essoigned* herself against Roger the Fat; and he did not do it; but two poor men not Knights came who said that they had been ordered to see the said Amiria with others.) Another entry in the same matter: 'Staff'. Dies datus est Rogero Crasso petenti et Eborardo de Hunesworth' de placito terre in Appelbi in Leic,' quia Amiria uxor Eborardi *esson*iavit se de malo lecti versus ipsum Rogerum' (Stafford. A day is given to Roger the Fat, *demandant* and Everard of Hunesworth in a plea of land in Appleby in Leicester because Amiria wife of Everard *essoigned* herself in a plea of sickness in bed against the said Roger). The writ given to the sheriff for such a view was called 'breve ad faciendum visum infirmitatem.'

appear,¹⁰ which was allowed on paying a fee, generally half a mark. If the knights visited him and found him sick, they generally assigned him a day a year and a day later 'in Turrim Londinensem' (at the Tower of London), and so reported to the court.

If the *tenant* did not appear, he might essoign himself in like manner; unless he did essoign himself, his lands were taken into the hands of the King, in obedience to a writ for that purpose directed to the sheriff of the county. In Hilary Term 2 Joh. (1201) we find the following:¹¹ "York, Precept was given to the sheriff the fifteenth day after the Feast of St. Martin that he should take into the hands of our Lord the King two carucates of land with appurtenances in Arkendale [in Knaresborough, Yorkshire] which Robert de Bullers [Boulers] and Eularia [Hilaria] his wife claimed against John de Birking, for the default of the latter, and notify the day of taking possession on St. Hilary's day, fifteen days hence." The sheriff would then take possession and notify the court; whereupon an entry would be made in some such form as the following:¹² "Sussex. The sheriff signified by his sealed writ¹³ that he took into the King's

10. E. g., in Trinity Term 2 Joh. (1200): 'Norht'. Henricus del Aunei qui se essoniavit de malo lecti petit licenciam venendi ad curiam; et habet' (Northampton. Henry del Aunei (or del Alneto) who essoigned himself on a plea of sickness in bed craves license of coming to court; and has it). An earlier case reads (Trinity Term 7 Ric. I 1196): 'Linc'. Robertus de Bruer' mandavit ad curiam die Sabbati proxima ante festum sancti Laurencii quod essoniavit se de malo lecti versus Gilebertum de Gant in curia domini regis apud Westmonasterium et quod convaluit et quod non fuit visus et petiit licenciam veniendi ad curiam et habuit; et statim in septimana sequenti venit et optulit se' (Lincoln. Robert of [Temple] Bruer [in Lincolnshire] sent word to the court, the Saturday next before the Feast of St. Laurence that he essoigned himself from sickness against Gilbert of Gaunt in the King's Court at Westminster and that he was recovered and that he had not been seen, and he prayed licence of coming into court and he had it; and forthwith in the next week he came and presented himself).

Here is another of Michaelmas Term, 2 Joh. (1200): 'Essex' Radulfus de Latton' qui se essoniavit de malo lecti versus Ricardum de Sifrewast', mandavit ad curiam per Johannem de Einesford' quod non fuit visus et quod convaluit et petiit licenciam veniendi; et habet' (Essex Ralph of [West] Layton [Yorkshire] who essoigned himself from sickness against Richard of Sifrewast sent word to the court by John of Einesford that he had not been seen and that he had recovered and he prayed license to come; and he has it).

11. "Ebor'. Preceptum fuit vicecomiti quintodecimo die post festum sancti Martini quod caperet in manum domini regis ij carucatas terre cum pertinentiis in Arkeden', quas Robertus de Bullers et Eularia uxor ejus clamant versus Johannem de Berkun, pro ejus defecto et diem prise mandaret a die sancti Hillarii in xv die. . . ." (Of course, this 'die' should be the plural, 'dies'.)

12. "Sussex'. Vicecomes significavit per breve sigillatum quod cepit it manum regis die Mercurii proximo ante Pentecosten, manerium de Waburtan', quod Olivia de Sancto Johanne clamat versus Willelmum de Portu, pro defectu Willelmi."

13. Sometimes the return was not under seal; the entry then said "significavit sed non per breve suum sigillatum"; or equivalent language was employed.

hand on Wednesday next before Pentecost, the Manor of Walberton [in Sussex County] which Olivia St. John claimed against William de Portu on account of William's default."

The default might be explained away, as in this very case:¹⁴ "Sussex. A day was given to William the Clerk, put in place of [i. e., attorney for] Roger de Munbugun and Olive his wife, in a plea of land against William de Portu on St. Michael's day, fifteen days hence, on the prayer of the said William [the Clerk], because the bailiff of Fulk Painei who had the land in charge came and said that he [i. e., de Portu] bore letters of our Lord the King to the Justiciar [Geoffrey Fitz Peter] that he should have peace concerning all his lands and his wards. And let it be noted that this land was taken into the King's hand and detained and not asked for except by the bailiff of Fulk."

If the default were satisfactorily explained,¹⁵ the land might be delivered up, on proper claim being made by the tenant. But if the land were not claimed, seisin went to the demandant, as in this case:¹⁶ "York. Duncan de Lascelles, for himself and his wife Christiana, on the fourth day presented himself against Philip de Mowbray and his wife Gillian in a plea of carucate and a half of land in [West] Layton [in Yorkshire]; and these did not appear or essoign themselves, and the land was taken into the King's hand and not claimed. Therefore it is considered that they [the demandants] should have their seisin."

Sometimes a sheer mistake was made, as in the case of a collateral ancestor of mine. In Trinity Term,¹⁷ 2 Joh. (1200), at

14. "Susex'. Dies datus est Willelmo Clerico posito loco Rogeri de Munbugun et Olive uxoris sue de placito terre versus Willelmum de Portu a die sancti Michaelis in xv dies prece ejusdem Willelmi; quia ballivus Fulconis Painei qui terram illam habet in custodia, venit et dixit quod ipse tulit literas domini regis ad justiciarium quod ipse habeat pacem de omnibus terris et wardis suis. Et notandum quod terra illa capta fuit in manum regis et detenta et non petita nisi per ballivum Fulconis."

Instead of the 'ad justiciarium,' above, another ms. has the equivalent language: 'domino G. filio Petri' (to Lord Geoffrey Fitz Peter); he was chief justiciar at the time.

15. There are a very few cases in which the party excuses non-attendance on the ground of difficulty of attendance 'de malo veniendi'; this would cover bad roads, etc.

16. 'Ebor'. Dunecanus de Lacell' pro se et Christiana uxore sua optulit se iij die versus Philippum de Munbray et Galienam uxorem ejus de placito j carucate terre et dimidie in Latton'; et ipsi non venerunt vel se essoniaverunt, et terra capta fuit in manum regis et non petita. Ideo consideratum quod ipsi habeant saisinam suam.'

17. "Norht'. Sibilla Ridel petit per plevinam terram suam, de Weston' die Sabbati vigilia sanctu Barnabe que capta est in manum regis sed nescitur qua de cause. . . ." This 'que' form (in line 2) occurs in many medieval manuscripts for 'quae,' feminine singular of 'quis'; cf. note 7 ante.

Northampton, "Sybil Ridel¹⁸ sought by plevin her land at Weston [Corby Hundred, Northamptonshire] on Saturday the Vigil of St. Barnabas, which was taken in the King's hand, but she knows not for what cause. . . ." Here is another instance of an erroneous taking:¹⁹ "Kent. Our Lord the King directs the justices by his writ that they should cause to be held in the King's hands the land of Hugh de Castellione which was taken in his hand for his [Hugh's] default until such time as Hugh de Neville should inform the King himself of the said Hugh: who says that the said Hugh on the day he was required to be before him [the King in his Court] was prominent in his service."

4. It must not be supposed that the demandant had plain sailing in every case to get this far. There were all sorts of traps and obstacles—amongst them, what came in later days to be called "dilatory pleas." For example, when in 1199 (Hilary Term, Ric. I) Agnes, daughter of Gilbert, claimed of Hugh de Scalariis, twenty acres of land in Toddeworth [i. e., Tetworth, Huntingdonshire], Hugh said he should not be called on to answer '*quia ipsa habet virum qui non nominatur in brevi*' (because she has a husband who is not named in the writ). This was (and until but the other day continued to be) a perfectly valid objection. The report proceeds:²⁰ "And because it was uncertain about her husband whether he was alive or not, the justices permitted them to come to an agreement. And they agreed upon this that the said Agnes called quits to Hugh aforesaid of her whole right and claim which she had in said lands for one mark, which he paid her." So, too, the Templars, who claimed to own the land, were not compelled to plead until the demandant had added their tenant as a defendant.

18. The original spelling of the name. The family of Norwegian origin came to Normandy with Rollo; then a branch settled in Aquitania. Some members came into England with William the Conqueror in 1066 and made their way north. By this time my immediate ancestors had got to Cumberland. Geoffrey de Ridel, Chief Justiciar, was a member of the family, as was Ridel, first Chancellor of Ireland. Geoffrey is named in a case in Easter Term, 9 Ric. I (1198), as the grandfather of Alice Cumin [Comyn] of Newbigging, Cumberland, and as having been '*tunc inimicus domini regis*' (at that time an enemy of the King), I presume, of Henry II, as Geoffrey Ridel was a Chief Justiciar of Stephen.

19. "Kent. Dominus rex precepit per breve suum justiciariis in banco quod teneri faciant in manu domini regis terram Hugonis de Castellione que capta fuit in manu sua pro ejusdem defectu, quousque Hugo de Nevill certificaverit ipsum regem de predicto Hugone: qui dicit ipsum Hugonem die quo debuit coram illo extitisse fuisse in servicio suo."

20. "Et quia incertum erat de viro suo utrum vivat necne, concesserunt justiciarii ut concordarent se: et concordati sunt per sic quod ipsa Angnes quietum clamavit predicto Hugoni totum jus et clamium suum quod habuit in terra illa pro j marca quam ei dedit."

In Trinity Term, 2 Joh. (1200), Jordan, son of Avice, sued Robert, the son of Berta [Bertha], for one hide of land in Creek-sea in Essex, claiming through his mother Avice. Robert defended and said that John's father "was worthless and for felony at the Assize of Clarendon [1164] lost his foot and arm, and he himself [Jordan] was born of a worthless body, and he [Robert] asked the judgment of the court whether he was called upon to answer concerning his free tenement to one so born. Jordan denied that his father ever thus lost his members as worthless."²¹ Robert put himself upon a jury of the vicinage, and a day was given. The final result does not appear; but a subsequent day for hearing judgment was set.

Again, the writ might be objected to. In Michaelmas Term,²² 2 Joh. (1200), in Norfolk, "Roger, son of Thurstan, went without a day against Odo, son of Geoffrey, in a plea of five acres with appurtenances in Witton because he had not his writ of right." So in a case in Hilary Term, 10 Ric. I (1199), John, son of Ralph, sued by a wrong writ, the court dismissed the action, but ordered 'Johannes placitet per breve de recto si voluerit' (let John sue by writ of right if he wishes).

A valid plea to a writ was the illegitimacy of the demandant. If that plea was raised, it was referred to the court of the Bishop. E. g., in a case in Trinity Term, 2 Joh. (1200), it is recorded that Thomas of Melton carried his writ of right before the justices in eyre at Thetford in Norfolk against William the Parson, and William charged Thomas with bastardy "whereupon he took a writ to the Bishop of Norwich to enquire whether he was legitimate or not."²³

5. It is now time to speak of the actual combat. Blackstone²⁴ gives a description of the proceedings when the duel was fought at

21. "Nequam fuit pro feloniam ad Assisam de Clarendon' perdidit pedem et brachium, et ipse genitus est de corpore nequam; et petit consideracionem curie utrum deberet ita genito de libero tenemento sue respondere. Jordanus defendit quod pater ejus nunquam ita perdidit membra sicut nequam." The old word "nithing" does not seem to have been used even in a Latinized form.

22. "Norf'. Rogerus filius Turstani recedit sine die versus Odonem filium Galfridi de placito v acrarum terre cum pertinenciis in Vitton' quia non habuit breve suum de recto."

23. "Unde ipse tulit breve ad episcopum Norwicensem ad inquirendum utrum legitime fuit natus vel non." "Legitime" here is, of course, the adverb.

There is a mistake here either in the Roll itself or in the printing; 'Gaufridus filius Thome' should read 'Gaufridus pater Thome.' A settlement was made; William Persona [the Parson] paid three marks [40 shillings], and Thomas 'Clamavit quietam' (cried quits).

24. "Commentaries" III p. 339.

Westminster in presence of the judges of the Court of Common Pleas; and 'mutatis mutandis' much of the description applies to a duel fought before justices in eyre or in the county.

The parties did not themselves fight; the reason alleged is that if either should be killed the action would abate. Each party had a champion ('campio'), and they came to the field armed with a club ('baculum') an ell long, and a four-cornered leathern target. They were dressed in a coat of armor, with red sandals, bareheaded, and bare to knees and elbows. A field was prepared for the duel by the sheriff or his deputies who selected four knights as 'custodes campi' (guardians of the field). The field was about sixty feet square, enclosed with a stand at one end for the justices; in Westminster there was also a bar for the serjeants-at-law. Each champion, taking the hand of the other, swore to the justice of his cause, and also took an oath against sorcery, witchcraft and enchantment. The battle was to continue until one champion killed the other (which rarely happened), or one proved "recreant" and pronounced the word "craven"; or, if neither of these events happened, then until the stars appeared in the evening. In case of a drawn battle, the tenant succeeded, 'potior est conditio defendentis.' The justices in eyre, sheriff and knights reported the result to the Curia Regis and an entry was made of record (it was also of record in the County Court if there fought); this would be 'res adjudicata' and bar all subsequent actions, by estoppel by matter of record.

There are fairly full accounts of two of such duels in the recent volume above mentioned—both being of considerable interest. In Hilary Term, 10 Ric. I (1199), we find the following turbulent chronicle:²⁵ "Wiltshire. Philip of Bristo appeals Robert Bloc for

25. "Wilt'. Philippus de Bristo appellat Robertum Bloc quod, cum esset in duello suo et pugnaret pro quadam terram domini sui Willelmi de Ponte des Arch' in comitatu Wiltes' et prostravisset socium suum, venit idem Robertus et nequiter et in pace domini regis abstulit ei arma sua et ei plagam fecit in capite cum baculo camponis [sic? campionis] prostrati: et hoc offert diracionare versus eum consideratione curie: et Robertus et omnes milites defendunt totum de verbo in verbum et dicunt quod interfuerunt duello sicut illi qui campum cutodierunt per preceptum Ade Clerici, qui fuit ibi loco vicecomitis, et quod nullam injuriam ibi fecerunt; et inde ponunt se super eundem Adam et super recordum comitatus et petunt quod eis allocetur quod omnes campiones conducticii sunt et quod cum duellum percussum fuit, tunc nullum fecerunt querimoniam nec in comitatu nec alibi. Consideratum est quod vicecomes et recordum comitatus summoneantur quod sint a die Pasche in j mensem apud Westmonasterium ad faciendum inde recordum.

Alexander de Lond' appellat Willelmum de Perci de vi illa.

Johannes Hereward' appellat Hugonem de Druceis et Robertum de Mara de vi illa.

Rogerus Waiffe appellat Willelmum de Cotes quod in vi illa extraxit cultellum suum ut eum occideret."

that, when he was in his duel and fighting for certain land of his master William de Ponte des Arches in the County of Wilts and has prostrated his opponent, the said Robert came and wickedly and in the King's peace took away his arms and gave him a blow on the head with the club of the prostrate champion, and this he offers to prove against him according to the direction of the court; and Robert and all the knights defend the whole word by word and say that they were present at the duel as keepers of the field by direction of Adam the Cleric who was there in place of the sheriff, and that they did no wrong there; and therein they put themselves upon the said Adam and upon the record of the County [Court] and pray that it be allowed in their behalf that all the champions were hired, and that when the duel was fought, they then made no complaint in the County Court or elsewhere. It is considered that the sheriff and the record of the County Court be summoned to Westminster for Friday in one month that a record may be there made.—Alexander of London appeals William de Percy of the same violence. John Hereward appeals Hugh de Druis and Robert de Mara of the same violence. Roger Waiffe appeals William de Cotes that in the same assault he drew his knife to kill him."

It is of course impossible to find out the rights of this case. Apparently there were several of these hired or professional champions, and perhaps more than one duel. Whether one of the champions was pressing his advantage too far (possibly to get rid of a professional competitor); or the knights were partial, or wished the play prolonged; or some of the appellors were interfering with the keepers of the field,—all these and many like questions lie in the realm of conjecture. A Sir Walter Scott could make much of the picture as we have it in the Rolls. But we hear nothing more about it; probably the professionals thought it better to drop their action than to run the risk of being "in misericordia."

The only other duel the account of which I extract has a domestic and romantic tint. In Hilary Term, 1 Joh. (1200), a question arose between Ralph de Grafton (who seems to have been sheriff of Worcester) and Hamon Passelewe, which would depend upon a duel recorded in the Court of Malmesbury; and Ralph was granted a writ to the sheriff to have the record brought in 'per iiij milites legales de eadem curia.' Shortly afterwards in the same term we find this entry:²⁶ "Wiltshire. Geoffrey de Brinkworth,

26. "Wilt'. Gaufridus de Brinkeworth Osmundus de Sumercot' Petrus de Eston' Willelmus de Sumerford' missi pro curia de Malmesberi ad ferendum recordum duelli quod fuit in ea tempore Manaseri Biset inter Hugonem Malet tenetem et Odiernam de Luserne petentem de v hidis terre

Osmund de Sumercote, Peter of Eston, William de Sumerford, sent on behalf of the Court of Malmesbury to bear the record of the duel which took place in it, in the time of Manaser Biset, between Hugh Malet tenant and Odierna de Luserne claimant, concerning five hides of land and appurtenances in Mursley, say that when the duel was in active progress, an agreement was made between them that the half of the land aforesaid should remain in the said Hugh and his heirs forever, and the other half go to Odierna for her whole life and after her decease to Hamon Passelewe, *who fought for her*, and to his heirs *by the daughter of the said Hodierna* for ever."

cum pertinenciis in Mureslega dicunt quod cum duellum concuteretur concordia facta fuit inter eos ita quod medietas tocius predicte terre remaneret ipsi Hugoni et heredibus ejus in perpetuum et Odierne alia medietas tota vita sua et post ejus decessum remaneret Hamoni Passelew' qui pro ipsa pugnavit et heredibus ejus cum filia ipsius Hodiernae in perpetuum."

THE MOVEMENT FOR INTERNATIONAL ASSIMILATION OF PRIVATE LAW: RECENT PHASES

BY JOHN H. WIGMORE*

Two events, apparently remarkable, have recently occurred in the field of Comparative Private Law, and challenge the earnest reflection of our profession in all countries.

On September 13, 1924, at Geneva, was founded the INTERNATIONAL ACADEMY OF COMPARATIVE LAW, with 30 members.

On September 24, 1924, at Geneva, the Italian delegation in the Assembly of the League of Nations announced the foundation by the Italian government of the INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, at Rome, under the control of the League, with a yearly grant of 1,000,000 lire.

These two establishments portend, on their face, a notable benefit to the cause of comparative private law and the international assimilation of commercial law.

But are these portents to be accepted at their face value?

The two establishments appear to have had no relation whatever, in motive or personnel, to each other. Yet they spring up suddenly, at the same place and in the same month. There is something of a mystery of genesis here. But, pending its solution, we propose to offer some data that will help to answer the above question. It ought to be answered as promptly as possible, in every country; because if the movements are sound, they deserve the hearty support of our profession; if not, misguided movements are to be discountenanced.

To value the movement, some recent history must first be sketched. We shall offer here: I. Historical Sketch; II. The International Academy of Comparative Law; III. The Institute for the Unification of Private Law; IV. Some Comments.

I. HISTORICAL SKETCH

Up to the middle of the 1600s, Europe was a mosaic of a thousand separate bodies of local law, with the romanesque law-

[*Dean of the Law School, Northwestern University.]

1. The full story here briefly sketched will be found in *Continental Legal History Series Vol. XI: "Progress of Continental Law in the 19th Century"* (1918), edited by the present writer; the last four chapters deal with this subject.

WAGER OF BATTEL IN A. D. 1200

BY WILLIAM RENWICK RIDDELL¹

To one who, like me, approached the study of the Common Law through the gateway of the Civil Law, the method by which the right to land was determined in the early English law is a constant source of amazement.

From shortly after the Conquest (at the latest) until well within the reign of Henry Plantagenet the only method was the judicial duel. Henry, with the consent of his nobles or Parliament, gave to the tenant of land claimed by another in court the privilege of having the ownership determined by twelve recognitors; though for this privilege the tenant must pay a fee ('oblatum' or 'oblatio') to the King, generally the minimum half-mark (or 6s 8d).² Blackstone in his *Commentaries on the Laws of England*,³ gives a reasonably full and accurate account of the practice; but by his time it had become conventionalized (and almost obsolete).

The recent volume published in 1922 by His Majesty's Stationery Office, London, "*Curia Regis Rolls of the reigns of Richard I and John preserved in the Public Records Office*," contains contemporary records of proceedings in the *Curia Regis*, 1196-1201. From these records may be gathered the actual conduct of a "Wager of Battel."

1. The Wager of Battel might be waged in three cases: (1) in the Court Martial, i. e., the Court of Chivalry and Honor, (2) in appeals of felony, and (3) in writs of right. The *Curia Regis* had to do with only the last two. At that time, it must be remembered, the *Curia Regis* had not yet divided into permanent separate courts. Of the twenty cases of judicial duel mentioned in this volume, twelve are on writ of right and therefore civil, and eight are on appeals of felony and therefore criminal. While the writ of right could be and often was brought in the County Court or the Baron's Court,

1. [Justice of the Supreme Court of Ontario.]

2. "The law [at this period] is too hard upon a demandant. . . . Even if all goes swiftly, the tenant has enormous advantages. He can choose between two modes of trial. He can insist that the whole question of better right (involving, as it may, the nicest questions of law) shall be left all in one piece to the knights of the neighborhood. And then, if he fears their verdict, he can trust to the God of battles; he can force the demandant to a 'probatio divina,' which is as much to be dreaded as any 'probatio diabolica' of the canonists" (*Pollock & Maitland "History" II 63*).

3. Book III pp. 337 et seq.

there is no mention of the *tolt writ* to remove a plaintiff from Court Baron to County Court, and only one or two of the *pone writ* to remove from County Court to the King's Court.

Apparently the first proceeding in cases in the *Curia Regis* was for the demandant to sue out his writ of right, and to have the tenant summoned by the *vice-comes* (sheriff) of the county through "good summoners," to be present before the justices of the court on a day named. On the day mentioned, if the demandant and tenant both appeared either in person or by attorney,⁴ the demandant made his claim and offered to prove it by a man or one of several men whom he named.

The demandant might withdraw the claim. In that case he was 'in misericordia' (in mercy), and paid a fine to the King, generally half a mark ('*dimidium marcum*'), but sometimes more. Sometimes a litigant 'in misericordia' escaped altogether, e. g., an early entry tells us: "*Robertus in misericordia: puer est, condonatus est*" (Robert in mercy: he is a boy, he is excused). One example of a record will suffice; in Hilary Term, 10 Ric. I (1199),⁵ "*Bedford: Robert Malherbe having a writ of novel disseisin against Simon de Bello Campo [Beauchamp] withdraws, in mercy. The fine is one mark.*"

If the claim was pressed, an entry such as this was made (the example is from Michaelmas Term 2 John, A. D. 1200):⁶

"Warwick: Henry de Ermenters demands against Geoffrey le Sauvage one military fee with appurtenances in Wooton [Leek] as his right and inheritance, as Isabella de Ermenters, grandmother of the said Henry, was seized of it as of right and of fee in the time of King Henry [the Second] father of our Lord the King by taking the esplees thereof to the value of one silver mark and more, and

4. The word "attorney" (*attornatus*) I find used only twice in the thousands of suits mentioned in these Rolls. The usual terminology is "*Thomas filius Eustacii positus loco abbatis de Winton*" (Thomas Fitz Eustace put in the place of the Abbot of Winchester). There are hundreds of entries like the following: "*Emma de Dunlege ponit loco suo Williamum de Rammescumbe versus Rogerum de Lega*" (Emma de Dunlege puts in her place William of Rammescumbe against Roger of Leigh.)

5. "*Bedef—Robertus Malherbe portans breve de nova disseisina super Simone de Bello Campo retraxit se et posuit se, in misericordia. Misericordia est j marca.*"

6. "*Warri—Henricus de Ermenters petit versus Gaufridum de Salvag' feodum j militis cum pertinenciis in Witton' sicut jus suum et hereditatem, sicut illud unde Ysabella de Ermenterres avia ipsius Henrici saisita fuit ut de jure et de feodo tempore Henrici Regis patris domini regis capiendo inde esplecias ad valenciam j marci argenti et plus: et hoc offert probare per Alanum de Hekinton', qui hoc offert ut de visu suo. . .*" (Instead of the latter expression is sometimes found "*qui hoc offert disracionare per corpus suum ut de visu et auditu. . .*") Ermenters or Ermenterres is the modern Armenters.

this he offers to prove by Alan of Hekinton, who offers the same as by seeing. . . ." (or "who offers to prove the same by his body as by sight and hearing. . . ."). Sometimes the witnesses are described as "free and lawful men" (*'liberi et legales homines'*); sometimes as the demandant's man or men (*'hominem suum,' 'homines suos'*).

The tenant not infrequently craves a view of the land: that is always granted him, and the case is enlarged, generally until the justices in eyre come into the county. E. g., in the case mentioned above, *"Gaufridus petit visum terre,"* Habeat. In adventu justiciariorum et interim fiat visus" (Geoffrey craves a view of the land. Let him have it. Till the coming of the justices and in the meantime let the view be had).

The reason for craving a view is sometimes given; e. g., *'quia habet inde plures terras'* (because he has several lands there); or *'quia, ut dicit, plures terras habet in eodem suburbio'* (because, as he says, he has several lands there in the same suburb [of Warwick]).

Sometimes the parties are accorded the right to come to an agreement, either on the spot or in the interim (*'interim habent licentiam concordandi'*); they paying a fee of *'dimidiam marcam'* or more. If they do agree, the agreement is recorded and remains of record *'in perpetuam testimoniam,'* and cannot thereafter be contradicted—this was the well-known "Fine."

The tenant may be ready and defends. E. g., Mabel de la Grave demanded against Avice of St. Quentin two hides of land, *'et hoc offert probare versus illam per Radulfum de Nor'* qui hoc offert disracionare per corpus suum ut de visu et auditu' (and this she offers to prove against her by Ralph de Norf[olk], who offers to deraign the same by his body as of sight and hearing). But Avice is ready: *'Hawisia defendit jus suum per quendam hominem suum, scilicet Robertum Pistorem de Notingham vel per alium per quem debuerit'* (Avice defends her right by a certain man of hers, namely, Robert Miller of Nottingham or by another by whom she ought). Sometimes the form is more extended, as this by Henry of Bedefunt [Bedfont] in Trinity Term, 1200: *'defendit totum jus suum per Willelmum liberum hominem suum vel per corpus suum proprium si de eo male contigerit'* (defends his whole right by Wil-

7. It must be borne in mind that in very many if not most mediaeval Latin manuscripts, the genitive and dative singular and nominative and vocative plural of nouns, pronouns and adjectives of the first declension have the termination "e" not "ae"; cf. note 17 post.

liam his freeman or by his own body if any ills befalls William).⁸ These champions were sometimes hired persons ('conducticii').

2. And now all is set: 'Consideratum est quod duellum vadietur' (it is considered that battel should be waged). But the champions must find pledges that they will fight—"pledges of battel" as they were afterwards called; often two in number, but sometimes only one for each. In the women's suit mentioned above the pledges are named: 'Plegius Radulfi, Thomas de Terefeld: Plegius Roberti, Radulfus Nicholai' (Pledge of Ralph, Thomas of Terefeld: Pledge of Robert, Ralph Nicholson).

If the duel is intended to be fought at Westminster, a day is fixed for it by the court and a direction given; 'et tunc veniant armati' (and let them then appear armed). In later years the duels were apparently always fought at Westminster. But at this time they were generally fought in the county, either before the justices in eyre or in the County Court, in presence of at least four knights girt with their swords ('milites'); in that case the day was not (as a rule) fixed by the Curia Regis.

3. This, the regular course, might be interrupted in several ways. The *demandant* might not appear in court to make his demand. He was then 'in misericordia' and paid a fine, unless he claimed sickness as the cause ('de malo lecti') or some other valid excuse as broken bridges, etc. ('de malo veniendi')—sending an *essoigner* ('essoniator') to make the excuse. If this was accepted, he *essoigned* himself, and a new day might be given him. If there was any doubt, four knights⁹ were generally selected by the sheriff (by order of the court or on a writ sued out by his opponents) to visit him and see. The inspection was sometimes not made; but when the sick man got well, he came to court and asked to be allowed to

8. Blackstone "Commentaries" III Appendix No. 1 p. iv, gives the form which the proceeding ultimately took.

9. I find one curious instance, in Trinity Term 2 Joh. (1200): 'Staff'. Loquendum de vicecomite Staff' cui preceptum fuit ij vicibus facere visum de infirmitate Amirie uxoris Eborardi unde essoniavit se versus Rogerum le Gras; et non fecit; sed dua pauperes, non milites, venerunt qui dixerunt quod eis preceptum fuit simul cum aliis videre ipsam Amiriam' (Stafford. The King must be spoken to about the Sheriff of Stafford who had been twice ordered to make inspection concerning the sickness of Amiria wife of Everard when she *essoigned* herself against Roger the Fat; and he did not do it; but two poor men not Knights came who said that they had been ordered to see the said Amiria with others.) Another entry in the same matter: 'Staff'. Dies datus est Rogero Crasso petenti et Eborardo de Hunesworth' de placito terre in Appelbi in Leic,' quia Amiria uxor Eborardi *essoniat* se de malo lecti versus ipsum Rogerum' (Stafford. A day is given to Roger the Fat, *demandant* and Everard of Hunesworth in a plea of land in Appleby in Leicester because Amiria wife of Everard *essoigned* herself in a plea of sickness in bed against the said Roger). The writ given to the sheriff for such a view was called 'breve ad faciendum visum infirmitatem.'

appear,¹⁰ which was allowed on paying a fee, generally half a mark. If the knights visited him and found him sick, they generally assigned him a day a year and a day later 'in Turrim Londinensem' (at the Tower of London), and so reported to the court.

If the *tenant* did not appear, he might essoign himself in like manner; unless he did essoign himself, his lands were taken into the hands of the King, in obedience to a writ for that purpose directed to the sheriff of the county. In Hilary Term 2 Joh. (1201) we find the following:¹¹ "York, Precept was given to the sheriff the fifteenth day after the Feast of St. Martin that he should take into the hands of our Lord the King two carucates of land with appurtenances in Arkendale [in Knaresborough, Yorkshire] which Robert de Bullers [Boulers] and Eularia [Hilaria] his wife claimed against John de Birking, for the default of the latter, and notify the day of taking possession on St. Hilary's day, fifteen days hence." The sheriff would then take possession and notify the court; whereupon an entry would be made in some such form as the following:¹² "Sussex. The sheriff signified by his sealed writ¹³ that he took into the King's

10. E. g., in Trinity Term 2 Joh. (1200): 'Norht'. Henricus del Aunei qui se essonavit de malo lecti petit licenciam venendi ad curiam; et habet' (Northampton. Henry del Aunei (or del Alneto) who essoigned himself on a plea of sickness in bed craves license of coming to court; and has it). An earlier case reads (Trinity Term 7 Ric. I 1195): 'Linc'. Robertus de Bruer' mandavit ad curiam die Sabbati proxima ante festum sancti Laurencii quod essoniavit se de malo lecti versus Gilebertum de Gant in curia domini regis apud Westmonasterium et quod convaleuit et quod non fuit visus et petit licenciam veniendi ad curiam et habuit; et statim in septimana sequenti venit et optulit se' (Lincoln. Robert of [Temple] Bruer [in Lincolnshire] sent word to the court, the Saturday next before the Feast of St. Laurence that he essoigned himself from sickness against Gilbert of Gaunt in the King's Court at Westminster and that he was recovered and that he had not been seen, and he prayed licence of coming into court and he had it; and forthwith in the next week he came and presented himself).

Here is another of Michaelmas Term, 2 Joh. (1200): 'Essex' Radulfus de Latton' qui se essoniavit de malo lecti versus Ricardum de Sifrewast', mandavit ad curiam per Johannem de Einesford' quod non fuit visus et quod convaleuit et petit licenciam veniendi; et habet' (Essex Ralph of [West] Layton [Yorkshire] who essoigned himself from sickness against Richard of Sifrewest sent word to the court by John of Einesford that he had not been seen and that he had recovered and he prayed license to come; and he has it).

11. "Ehor'. Preceptum fuit v cecomiti quintodecimo die post festum sancti Martini quod caperet in manum domini regis ij carucatas terre cum pertinentiis in Arkeden', quas Robertus de Bullers et Eularia uxor ejus clamant versus Johannem de Berkum, pro ejus defecto et diem prise mandaret a die sancti Hillarii in xv die. . . ." (Of course, this 'die' should be the plural, 'dies'.)

12. "Sussex'. Vicecomes significavit per breve sigillatum quod cepit it manum regis die Mercurii proximo ante Pentecosten, manerium de Waburtan', quod Olivia de Sancto Johanne clamat versus Willelmum de Portu, pro defectu Willelmi."

13. Sometimes the return was not under seal; the entry then said "significavit sed non per breve suum sigillatum"; or equivalent language was employed.

hand on Wednesday next before Pentecost, the Manor of Walberton [in Sussex County] which Olivia St. John claimed against William de Portu on account of William's default."

The default might be explained away, as in this very case:¹⁴ "Sussex. A day was given to William the Clerk, put in place of [i. e., attorney for] Roger de Munbugun and Olive his wife, in a plea of land against William de Portu on St. Michael's day, fifteen days hence, on the prayer of the said William [the Clerk], because the bailiff of Fulk Painel who had the land in charge came and said that he [i. e., de Portu] bore letters of our Lord the King to the Justiciar [Geoffrey Fitz Peter] that he should have peace concerning all his lands and his wards. And let it be noted that this land was taken into the King's hand and detained and not asked for except by the bailiff of Fulk."

If the default were satisfactorily explained,¹⁵ the land might be delivered up, on proper claim being made by the tenant. But if the land were not claimed, seisin went to the demandant, as in this case:¹⁶ "York. Duncan de Lascelles, for himself and his wife Christiana, on the fourth day presented himself against Philip de Mowbray and his wife Gillian in a plea of carucate and a half of land in [West] Layton [in Yorkshire]; and these did not appear or essoign themselves, and the land was taken into the King's hand and not claimed. Therefore it is considered that they [the demandants] should have their seisin."

Sometimes a sheer mistake was made, as in the case of a collateral ancestor of mine. In Trinity Term,¹⁷ 2 Joh. (1200), at

14. "Sussex". Dies datus est Willelmo Clerico posito loco Rogeri de Munbugun et Olive uxoris sue de placito terre versus Willelmum de Portu a die sancti Michaelis in xv dies prece ejusdem Willelmi; quia ballivus Fulconis Painel qui terram illam habet in custodia, venit et dixit quod ipse tulit literas domini regis ad justiciarium quod ipse habeat pacem de omnibus terris et wardis suis. Et notandum quod terra illa capta fuit in manum regis et detenta et non petita nisi per ballivum Fulconis."

Instead of the 'ad justiciarium,' above, another ms. has the equivalent language: 'domino G. filio Petri' (to Lord Geoffrey Fitz Peter); he was chief justiciar at the time.

15. There are a very few cases in which the party excuses non-attendance on the ground of difficulty of attendance 'de malo veniendi'; this would cover bad roads, etc.

16. 'Ebor'. Dunecanus de Lacell' pro se et Christiana uxore sua optulit se iij die versus Philippum de Munbray et Galienam uxorem ejus de placito j carucate terre et dimidie in Latton'; et ipsi non venerunt vel se essonniaverunt, et terra capta fuit in manum regis et non petita. Ideo consideratum quod ipsi habeant saisinam suam.'

17. "Norht". Sibilla Ridel petit per plevinam terram suam de Weston' die Sabbati vigilia sanctu Barnabe que capta est in manum regis sed nescitur qua de cause. . . ." This 'que' form (in line 2) occurs in many medieval manuscripts for 'quae,' feminine singular of 'quis'; cf. note 7 ante.

Northampton, "Sybil Ridel¹⁸ sought by plevin her land at Weston [Corby Hundred, Northamptonshire] on Saturday the Vigil of St. Barnabas, which was taken in the King's hand, but she knows not for what cause. . . ." Here is another instance of an erroneous taking:¹⁹ "Kent. Our Lord the King directs the justices by his writ that they should cause to be held in the King's hands the land of Hugh de Castellione which was taken in his hand for his [Hugh's] default until such time as Hugh de Neville should inform the King himself of the said Hugh: who says that the said Hugh on the day he was required to be before him [the King in his Court] was prominent in his service."

4. It must not be supposed that the demandant had plain sailing in every case to get this far. There were all sorts of traps and obstacles—amongst them, what came in later days to be called "dilatory pleas." For example, when in 1199 (Hilary Term, Ric. I) Agnes, daughter of Gilbert, claimed of Hugh de Scalariis, twenty acres of land in Toddeworth [i. e., Tetworth, Huntingdonshire], Hugh said he should not be called on to answer 'quia ipsa habet virum qui non nominatur in brevi' (because she has a husband who is not named in the writ). This was (and until but the other day continued to be) a perfectly valid objection. The report proceeds:²⁰ "And because it was uncertain about her husband whether he was alive or not, the justices permitted them to come to an agreement. And they agreed upon this that the said Agnes called quits to Hugh aforesaid of her whole right and claim which she had in said lands for one mark, which he paid her." So, too, the Templars, who claimed to own the land, were not compelled to plead until the demandant had added their tenant as a defendant.

18. The original spelling of the name. The family of Norwegian origin came to Normandy with Rollo; then a branch settled in Aquitania. Some members came into England with William the Conqueror in 1066 and made their way north. By this time my immediate ancestors had got to Cumberland. Geoffrey de Ridel, Chief Justiciar, was a member of the family, as was Ridel, first Chancellor of Ireland. Geoffrey is named in a case in Easter Term, 9 Ric. I (1198), as the grandfather of Alice Cumin [Comyn] of Newbigging, Cumberland, and as having been 'tunc inimicus domini regis' (at that time an enemy of the King), I presume, of Henry II, as Geoffrey Ridel was a Chief Justiciar of Stephen.

19. "Kent. Dominus rex precepit per breve suum justiciariis in banco quod teneri faciant in manu domini regis terram Hugonis de Castellione que capta fuit in manu sua pro ejusdem defectu, quousque Hugo de Nevill' certificaverit ipsum regem de predicto Hugone: qui dicit ipsum Hugonem die quo debuit coram illo extitisse fuisse in servicio suo."

20. "Et quia incertum erat de viro suo utrum vivat necne, concesserunt justiciarii ut concordarent se: et concordati sunt per sic quod ipsa Angnes quietum clamavit predicto Hugoni totum jus et clamium suum quod habuit in terra illa pro j marca quam ei dedit."

In Trinity Term, 2 Joh. (1200), Jordan, son of Avice, sued Robert, the son of Berta [Bertha], for one hide of land in Creekssea in Essex, claiming through his mother Avice. Robert defended and said that John's father "was worthless and for felony at the Assize of Clarendon [1164] lost his foot and arm, and he himself [Jordan] was born of a worthless body, and he [Robert] asked the judgment of the court whether he was called upon to answer concerning his free tenement to one so born. Jordan denied that his father ever thus lost his members as worthless."²¹ Robert put himself upon a jury of the vicinage, and a day was given. The final result does not appear; but a subsequent day for hearing judgment was set.

Again, the writ might be objected to. In Michaelmas Term,²² 2 Joh. (1200), in Norfolk, "Roger, son of Thurstan, went without a day against Odo, son of Geoffrey, in a plea of five acres with appurtenances in Witton because he had not his writ of right." So in a case in Hilary Term, 10 Ric. I (1199), John, son of Ralph, sued by a wrong writ, the court dismissed the action, but ordered 'Johannes placitet per breve de recto si voluerit' (let John sue by writ of right if he wishes).

A valid plea to a writ was the illegitimacy of the demandant. If that plea was raised, it was referred to the court of the Bishop. E. g., in a case in Trinity Term, 2 Joh. (1200), it is recorded that Thomas of Melton carried his writ of right before the justices in eyre at Thetford in Norfolk against William the Parson, and William charged Thomas with bastardy "whereupon he took a writ to the Bishop of Norwich to enquire whether he was legitimate or not."²³

5. It is now time to speak of the actual combat. Blackstone²⁴ gives a description of the proceedings when the duel was fought at

21. "Nequam fuit pro feloniam ad Assisam de Clarendon' perdidit pedem et brachium, et ipse genitus est de corpore nequam; et petit considerationem curie utrum deberet ita genito de libero tenemento sue respondere. Jordanus defendit quod pater ejus nunquam ita perdidit membra sicut nequam." The old word "nothing" does not seem to have been used even in a Latinized form.

22. "Norf'. Rogerus filius Turstani recedit sine die versus Odonem filium Galfridi de placito v acrarum terre cum pertinenciis in Vitton' quia non habuit breve suum de recto."

23. "Unde ipse tulit breve ad episcopum Norwicensem ad inquirendum utrum legitime fuit natus vel non." "Legitime" here is, of course, the adverb.

There is a mistake here either in the Roll itself or in the printing; 'Gaufridus filius Thome' should read 'Gaufridus pater Thome.' A settlement was made; William Persona [the Parson] paid three marks [40 shillings], and Thomas 'Clamavit quietam' (cried quits).

24. "Commentaries" III p. 339.

Westminster in presence of the judges of the Court of Common Pleas; and 'mutatis mutandis' much of the description applies to a duel fought before justices in eyre or in the county.

The parties did not themselves fight; the reason alleged is that if either should be killed the action would abate. Each party had a champion ('campio'), and they came to the field armed with a club ('baculum') an ell long, and a four-cornered leathern target. They were dressed in a coat of armor, with red sandals, bareheaded, and bare to knees and elbows. A field was prepared for the duel by the sheriff or his deputies who selected four knights as 'custodes campi' (guardians of the field). The field was about sixty feet square, enclosed with a stand at one end for the justices; in Westminster there was also a bar for the serjeants-at-law. Each champion, taking the hand of the other, swore to the justice of his cause, and also took an oath against sorcery, witchcraft and enchantment. The battle was to continue until one champion killed the other (which rarely happened), or one proved "recreant" and pronounced the word "craven"; or, if neither of these events happened, then until the stars appeared in the evening. In case of a drawn battle, the tenant succeeded, 'potior est conditio defendentis.' The justices in eyre, sheriff and knights reported the result to the Curia Regis and an entry was made of record (it was also of record in the County Court if there fought); this would be 'res adjudicata' and bar all subsequent actions, by estoppel by matter of record.

There are fairly full accounts of two of such duels in the recent volume above mentioned—both being of considerable interest. In Hilary Term, 10 Ric. I (1199), we find the following turbulent chronicle:²⁵ "Wiltshire. Philip of Bristo appeals Robert Bloc for

25. "Wilt'. Philippus de Bristo appellat Robertum Bloc quod, cum esset in duello suo et pugnaret pro quadam terram domini sui Willelmi de Ponte des Arch' in comitatu Wiltes' et prostravisset socium suum, venit idem Robertus et nequiter et in pace domini regis abstulit ei arma sua et ei plagam fecit in capite cum baculo camponis [sic? campionis] prostrati: et hoc offert diracionare versus eum consideratione curie: et Robertus et omnes milites defendunt totum de verbo in verbum et dicunt quod interfuerunt duello sicut illi qui campum cutodierunt per preceptum Ade Clerici, qui fuit ibi loco vicecomitis, et quod nullam injuriam ibi fecerunt; et inde ponunt se super eundem Adam et super recordum comitatus et petunt quod eis allocetur quod omnes campiones conducticii sunt et quod cum duellum percussum fuit, tunc nullum fecerunt querimoniam nec in comitatu nec alibi. Consideratum est quod vicecomes et recordum comitatus summonneantur quod sint a die Pasche in j mensem apud Westmonasterium ad faciendum inde recordum.

Alexander de Lond' appellat Willelmum de Perci de vi illa.

Johannes Hereward' appellat Hugonem de Drueis et Robertum de Mara de vi illa.

Rogerus Waiffe appellat Willelmum de Cotes quod in vi illa extraxit cultellum suum ut eum occideret."

that, when he was in his duel and fighting for certain land of his master William de Ponte des Arches in the County of Wilts and has prostrated his opponent, the said Robert came and wickedly and in the King's peace took away his arms and gave him a blow on the head with the club of the prostrate champion, and this he offers to prove against him according to the direction of the court; and Robert and all the knights defend the whole word by word and say that they were present at the duel as keepers of the field by direction of Adam the Cleric who was there in place of the sheriff, and that they did no wrong there; and therein they put themselves upon the said Adam and upon the record of the County [Court] and pray that it be allowed in their behalf that all the champions were hired, and that when the duel was fought, they then made no complaint in the County Court or elsewhere. It is considered that the sheriff and the record of the County Court be summoned to Westminster for Friday in one month that a record may be there made.—Alexander of London appeals William de Percy of the same violence. John Hereward appeals Hugh de Drueis and Robert de Mara of the same violence. Roger Waiffe appeals William de Cotes that in the same assault he drew his knife to kill him."

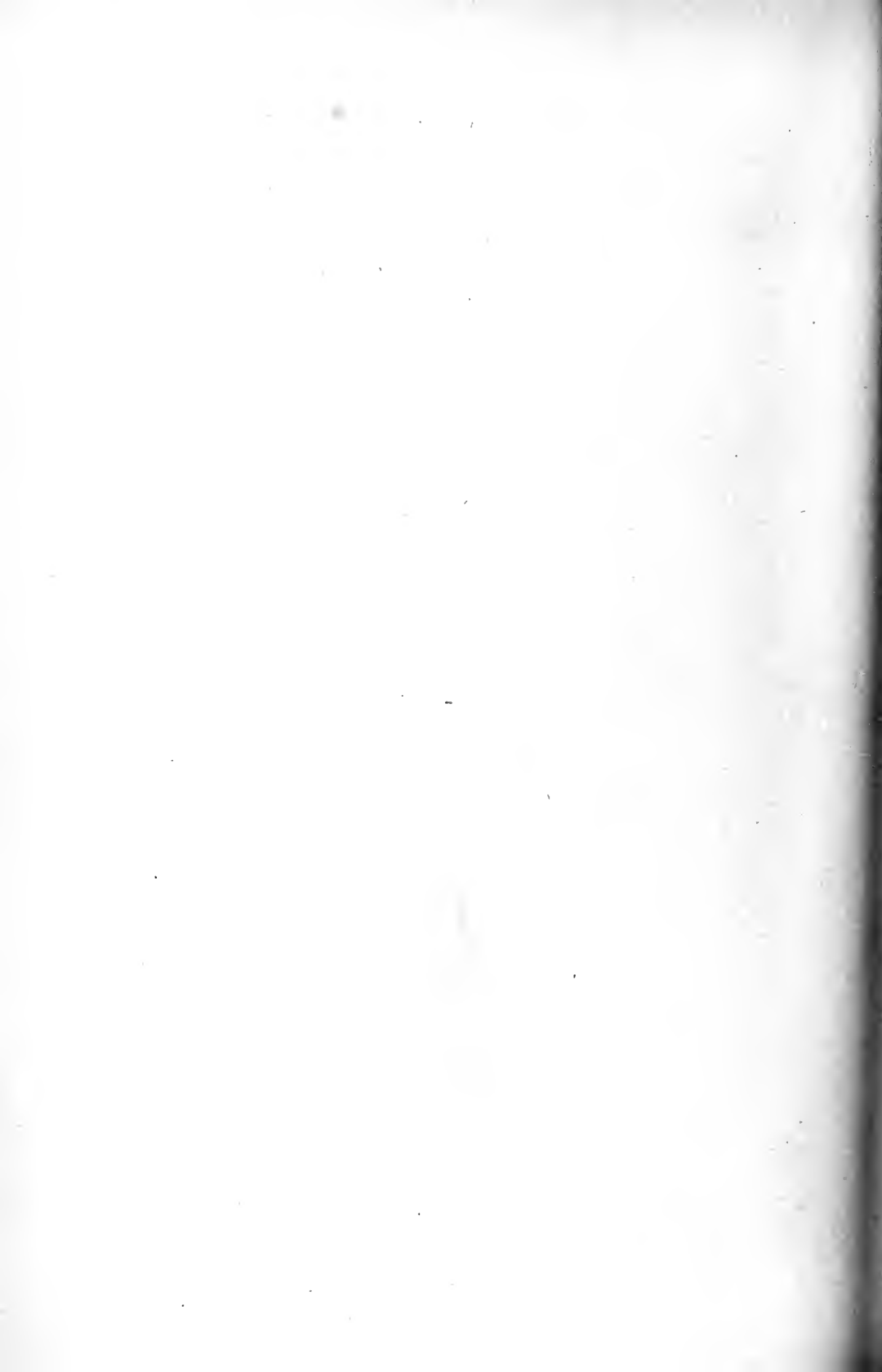
It is of course impossible to find out the rights of this case. Apparently there were several of these hired or professional champions, and perhaps more than one duel. Whether one of the champions was pressing his advantage too far (possibly to get rid of a professional competitor); or the knights were partial, or wished the play prolonged; or some of the appellors were interfering with the keepers of the field,—all these and many like questions lie in the realm of conjecture. A Sir Walter Scott could make much of the picture as we have it in the Rolls. But we hear nothing more about it; probably the professionals thought it better to drop their action than to run the risk of being "in misericordia."

The only other duel the account of which I extract has a domestic and romantic tint. In Hilary Term, 1 Joh. (1200), a question arose between Ralph de Grafton (who seems to have been sheriff of Worcester) and Hamon Passelewe, which would depend upon a duel recorded in the Court of Malmesbury; and Ralph was granted a writ to the sheriff to have the record brought in 'per iiij milites legales de eadem curia.' Shortly afterwards in the same term we find this entry:²⁶ "Wiltshire. Geoffrey de Brinkworth,

26. "Wilt'. Gaufridus de Brinkeworth Osmundus de Sumercot' Petrus de Eston' Willelmus de Sumerford' missi pro curia de Malmesberi ad ferendum recordum duelli quod fuit in ea tempore Manaseri Biset inter Hugonem Malet tenetem et Odiernam de Luserne petentem de v hidis terre

Osmund de Sumercote, Peter of Eston, William de Sumerford, sent on behalf of the Court of Malmesbury to bear the record of the duel which took place in it, in the time of Manaser Biset, between Hugh Malet tenant and Odierna de Luserne claimant, concerning five hides of land and appurtenances in Mursley, say that when the duel was in active progress, an agreement was made between them that the half of the land aforesaid should remain in the said Hugh and his heirs forever, and the other half go to Odierna for her whole life and after her decease to Hamon Passelewe, *who fought for her*, and to his heirs *by the daughter of the said Hodierna* for ever."

cum pertinenciis in Mureslega dicunt quod cum duellum concuteretur concordia facta fuit inter eos ita quod medietas totius predicte terre remaneret ipsi Hugoni et heredibus ejus in perpetuum et Odierne alia medietas tota vita sua et post ejus decessum remaneret Hamoni Passelew' qui pro ipsa pugnavit et heredibus ejus cum filia ipsius Hodierne in perpetuum."



"NOW AND THEN."—Samuel Warren¹ was in the second quarter of the nineteenth century a man of some note at the London bar, but his chief ambition was rather literary than legal. He thought more of his fellowship in the Royal Society,² then struggling to be a scientific body, but still rather a social club, than of his special pleadership and his later Q. C. An author of some legal works now quite forgotten except by a few lawyers of antiquarian tastes, he, in 1830-37, published his "Passages from the Diary of a Late Physician."³

He was well qualified for such a work, as before taking to the bar he had studied medicine in Edinburgh, and while the book had no great merit, literary or otherwise, it had such 'vraisemblance' as to call from the *London Lancet* a strong protest against the disclosure of professional secrets.

But his great work and one no lawyer should fail to read was published in 1839-41—the celebrated "Ten Thousand a Year."⁴ It

1. Samuel Warren (1807-1877), born at "The Rackery" near Wrexham, North Wales, the son of Samuel Warren, a very influential Wesleyan preacher who was in 1834 expelled by Conference; he had founded a society of 15,000 strong who followed him from the Wesleyan body and were known as "Warrenites." The preacher however received orders in the Church of England and was inducted into the living of All Souls, Ancoats.

Samuel was brought up in devout Methodism but later was a strong Churchman, admiring and loving the Church of England, her ritual, doctrines and clergy. A younger son (quem, Consule Planco, cognovi et valde dilexi) became a clergyman of that communion and was for many years a rector of a Protestant Episcopal Church in New York City; it was to him that Warren dedicated the work "Now and Then" as a "Token of Love."

After two years in Medicine at Edinburgh,—no bad preparation for Law,—Warren entered the Middle Temple and was called in 1837. His success was only fair but in 1851 he became a Q. C. and Bencher of his Inn—in 1853 he was made D. C. L. by Oxford—elected M. P. for Midhurst in 1856, he in 1859 accepted a Mastership in Lunacy from Lord Chelmsford with a salary of £2000 a year—a rumor that he had declined the offer led Disraeli to remark that a writ de lunatico inquirendo would have to be issued for him. He proved a competent judge as he was a sound lawyer with a large fund of common sense.

2. He was elected F. R. S. in 1835, although he does not seem to have had any claim to scientific knowledge.

3. "A Popular and Practical Introduction to Law Studies" (London 1835, enlarged 1845) with many American editions (it procured for him many law students, among them the novelist, Charles Reade); "Select Extracts from Blackstone's Commentaries" (1837); "A Manual of the Parliamentary Law of the United Kingdom" (London 1852, also 1857); "A Manual of the Law and Practice of Election Committees" (London 1853); an edition of "Blackstone's Commentaries" (London 1855, 1856); "The Moral, Social, and Professional Duties of Attorneys and Solicitors" (London 1848, 1852, and a few others of no permanent value).

4. It was this work which induced Sir George Rose's lines:

"Though envy may sneer at you, Warren, and say

'Why, yes, he has talent, but throws it away';

Take a hint, change the venue and still persevere,

And you'll end as you start with Ten Thousand a Year."

Warren consoled himself for his want of speedy advancement in his profession by attributing it to the revenge taken by attorneys for his unflattering picture of them and their practices in his novel.

is impossible not to recognize that this novel owes its origin, at least in part, to "The Pickwick Papers";⁵ and, indeed, Warren was wholly convinced that it "beat Boz hollow." Few would now agree in that conclusion, but *Doe dem Titmouse v. Aubrey* in the Common Pleas certainly deserves a place beside *Bardell v. Pickwick*, Quirk, Gammon, and Snap beside Dodson and Fogg, and Mr. Quicksilver beside Sergeant Buzfuz.

In the latter part of 1847, he wrote a story of some 125,000 words in less than three weeks.⁶ Published in London in December, 1847, it was promptly stolen by a New York firm—as was the gentle custom in those days of American publishers—and published in New York in 1848.

The title "Now and Then—Through a Glass Darkly" gives no clue to the contents; and the book is of no value except as throwing many sidelights on society in England, *inter alia*, on the criminal law.

The plot is simple enough—one Ayliffe being convicted of the murder of Lord Alkmond and sentenced to death, his pastor, Rev. Mr. Hylton⁷ went to London and secured from the Lord Chief Justice, the trial judge, a respite for a fortnight to enable certain enquiries to be made—these enquiries proving futile, the clergyman, firmly convinced of Ayliffe's innocence, wrote to the King entrusting the letter to a nobleman of his acquaintance—the nobleman traveled thirty miles to present it at St. James's and found that the King had been in bed an hour. His Majesty was awakened, glanced over the letter and sent for the Secretary of State (who had refused to extend the respite) and in the face of his remonstrances and suggestion that "this was a constitutional monarchy," he ordered that the sentence should be commuted to transportation for life.

Twenty years afterwards, the true culprit being about to suffer execution for "stealing a piece of cotton goods, value ten shillings, from a bleaching field," made a written confession. The Earl of Milverstoke, the petulant father of Lord Alkmond paid for a special ship to bring the innocent Ayliffe home and he arrived just in time to see his crippled son win from Lord Alkmond's son, the Senior Wranglership at Cambridge. The Earl dying left the Ayliffes "the munificent bequest of ten thousand pounds" and the story ends.

My only purpose in this paper is to show the condition of affairs in England at the time,⁸ in respect of certain parts of the law.

5. Dickens had published his "Pickwick" in 1836, 1837.

6. According to his own account, between November 20 and December 9, 1847; the dedication is dated December 18, 1847, the day of publication.

7. Hylton might almost be considered the hero of the story—his scholarship, piety, modesty, charity, industry, self-sacrifice, courage, are all superlative—if he had any human failing it is not obvious; he does not even say "I told you so." This character is but one of many evidences of Warren's sincere devotion to his church.

8. It is quite impossible to reconcile the various statements and suggestions so as to give a consistent date to the supposed events of this story.

It is supposed to begin "Somewhere about a hundred years ago"; i. e., somewhere about 1747, in a good King's reign and he was a King George;

The first matter to attract attention is the atrocious game laws which justified and, as he thought, compelled a humane magistrate to send to gaol for three months a poor man who had not as many shillings in default of paying a fine of five pounds for the heinous offense of being in possession of a hare given him for strengthening food for his ailing wife by a poacher. They were the occasion, too, of the shooting of one brother and the transportation of another brother of the murderer and consequently the by no means remote cause of the murder of Lord Alkmond.

It is a matter of congratulation that we did not introduce into Canada that part of the law of England; every Canadian youth of my generation was accustomed to the use of firearms and many were the hares, rabbits and squirrels that fell to their shotguns. We ranged our neighbor's woods as freely as our own—neither he nor we having any thought of "trespass." Well did the old yeoman in Warren's story say: "Meddle not with game which in these times is verily like hell-fire, the least touch of which burns terribly"; the magistrate thought that the game laws "were the only things that prevented the country from becoming barbarous" and that poaching was "an enormous vice."

The brutality of the law did not stop as it did not begin with poaching—the larcenor felt it; any one convicted of grand larceny was liable to be hanged. The author speaking of the assize at which Ayliffe was to be tried, says: "There were two other capital cases fixed for the same day but of no public interest; being only those of a farmer's man for stealing a pair of shoes from a booth

consequently, it must have been not earlier than 1715 or later than sometime in the reign of George III. As the King writes an autograph letter in English to the Earl of Milverstoke, which neither George I nor George II could do, they are excluded and they would be equally excluded by the fact that the King takes a personal interest in the welfare of his English subjects and causes his Secretary of State to grant a commutation of the sentence of death upon Ayliffe. George III from (say) 1770 could do that, George I or George II, never.

Again a man is convicted about twenty years afterwards under an Act of 1745, so that in no case could the story begin later than about 1725, while the sentence imposed on Ayliffe was first authorized in 1752.

Perhaps if the date were placed at "about seventy" instead of "about a hundred years ago," the vraisemblance would be preserved, but that would be inconsistent with the "troubles in the North" which can refer only to the affair of 1745.

9. How well early familiarity with the use of firearms has served Canadians may be seen in the War of 1812, the Rebellion in the North West, the South African War and the Great War. It may be of interest to note that Captain John Simcoe, father of Col. John Graves Simcoe (the first Lieutenant Governor of Upper Canada) had in 1756 urged the repeal of the game laws and permission given to the people to shoot game; pointing out that "Buccaneers, the Negroes and the Indians who carry their guns for subsistence are the best marksmen and the most dangerous partisans in the world," he said "So will the English prove when allowed the exercise of firearms, the prohibition of which by the game laws has broken that British spirit and extinguished that bravery heretofore the terror of the French nation." New Orleans was still far in the future with its terrible lesson of the fearful efficiency of firearms in the hands of those fairly accustomed to use them.

in a fair and another for taking a cheese from a dairy. These were simple cases and could be quickly disposed of."

And they were quickly disposed of—the men were tried on Friday and duly hanged early the following Monday. "Poor souls, they died . . . with great penitence acknowledging if not the lenity of the laws the justice of the sentence under which they suffered; for, indeed, how could they do otherwise when the stolen articles had been found in their actual possession?"

They could not have "benefit of clergy" even for a first offense. This would have excused them from the pains of death had their offense been but simple larceny or even the ordinary mixed or compound larceny, but unfortunately the offenses were within acts of Parliament (due, said the lawyers, to the advance in England of trade and opulence) which took away the benefit of clergy; and they must hang.

As long ago as 1552, the Statute 5, 6, Edw. VI, e. g., had taken away the benefit of clergy from those found guilty of any of many named offenses, one of them being robbery done in any booth or tent in any fair or market, the owner, his wife, children or servant being therein—section V. The offender in respect of the cheese was in equally hard case.

These hardened criminals appear to have thought the law under which they suffered death rather severe, but they had not carefully considered the necessity for it as did another culprit, one Isaac Hart, alias Jonas Handle, who "was executed pursuant to the Statute 18 Geo. II c. 27, for stealing a piece of cotton goods, value ten shillings, from a bleaching-field."

Parliament had in 1745, enacted that anyone who stole "linen, fustian, callico, cotton, cloth," etc., to the value of ten shillings from any "ground or place made use of by any callico printer, witster, crofter, bowker or bleacher for printing, bowking, bleaching, or drying of the same"¹⁰ should suffer death without benefit of clergy. The court, however, might sentence to transportation "into any of His Majesty's colonies or plantations in America for the space of fourteen years."

Whether it was because of the convict's evil reputation—for one who knew him well said that "he hath had a long hide-and-seek with Satan" and "there was every reason to believe that this was a second offense"—or for some other reason, he received no clemency, but was sentenced to die.

It is cheering to note that while that did seem to him hard at first, when—to use his own words—"I bethought me of the great

10. "Witster" is unknown alike to Latham, the Imperial, the Encyclopaedic, the Standard, Webster, Worcester, Marsh, Jameson and Wright.

"Crofter" is "one who crofts or bleaches linen on the grass." New English Dictionary sub voc. "Bowker" is unknown to N. E. Dict., Latham,

wickedness of robbing people that were forced to have their goods put out in open air for to bleach," he saw the justice of the law and died penitent.

The remorse felt by Lord Alkmond for killing a man in a fair duel seems inconsistent with the sentiments of the supposed date. Of course, by the law of England, those who took part in a fatal duel were all indictable for murder (except the dead man), but, as was said by a Chief Justice of Upper Canada in charging the jury in such a case, "juries have not been known to convict when all was fair."¹¹ Even in poor Major Oneby's case, the jury took refuge in a special verdict.¹²

Later still, in 1840, when the notorious Lord Cardigan was charged with murder for killing Captain Tuckett in a duel, Sir John Campbell, the attorney general prosecuting, said that "the charge does not imply any degree of moral turpitude and . . . the conviction will reflect no lasting discredit upon the illustrious order to which he belongs."¹³

Coming now to the case of Ayliffe, the first thing to be noticed is that he is constantly in irons. On his arrest he is handcuffed although he made no resistance; in prison he is manacled till brought to trial "to the clanking sound of irons" and walking between two jailers with difficulty in his heavy irons. He pleads in irons and while the chief justice¹⁴ directs the irons to be removed during the actual trial, they are replaced immediately after sentence and he is manacled until the irons are to be struck off for his execution. He lies "heavily ironed in the condemned cell"; "manacled and fettered" he sees his friends, his father, wife and child.¹⁵

the Imperial, the Encyclopaedic, the Standard, Webster, Worcester, Marsh, Jameson and Wright.

"Bowking—the process of boiling in an alkaline dye in a Kier." Encyclopaedic Dict. sub voc. "Kier" or "Keir," the alkaline vat of a bleachery, do. do.

11. Chief Justice Sir John Beverley Robinson in *Rex v. John Wilson* at Brockville, August, 1833. See my Article "The Duel in Early Upper Canada" *Can. L. Times* (September, 1915) 35:726, sqq.

12. *R. v. Oneby* (1726) 2 Ld. Raym. 1485; 2 Str. 766; 17 St. Tr. 29.

13. See an interesting account of this trial in a recent publication: "Famous Trials Re-told" by Horace Wyndham, London.

14. His name, naturally enough, is not given, but the character seems to be based on Lord Denny who was Lord Chief Justice at the time this book was written and whose clear, concise and impartial style is admirably imitated in the charge to the jury.

15. *Blackstone* "Comm." Bk. IV p. 300, says that in "the dubious interval between the commitment and trial a prisoner ought to be used with the utmost humanity and neither be loaded with needless fetters or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only," but the brutality of gaolers was sometimes unchecked.

The course at the trial was correct. *Blackstone* says, do. do. p. 122: "It is laid down in our ancient books that under an indictment of the highest nature, he must be brought to the bar without irons or any manner of shackles or bonds unless there be evident danger of an escape and then he may be secured with irons. But yet in *Laver's* case (16 State Trials 93), in A. D. 1722, a difference was taken between the time of arraignment and the time of

Ayliffe had counsel, "but only to cross-examine the witnesses or (if he could) detect an objection to the proceedings in point of law; not being permitted to say one word for his client to the jury." At the time supposed only those charged with high treason or misdemeanor had the right to make their full defense by counsel—those charged with misdemeanor always had that right and those charged with high treason acquired it in 1696 by the Act 7 and 8 Will. III c. 1. The right was given in all charges of felony in 1836 by the Act 6 and 7 Will IV c. 114.

The prisoner, however, was allowed to address the jury as Ayliffe did against the views of his attorney and counsel who wisely thought it would do more harm than good. It is pleasant to be able to state that neither attorney nor his London agent would accept anything but their cash disbursements—this with some evil-minded people would at once brand the whole story as a fiction.

There was no long delay about the trial—the Lord Chief Justice took his seat upon the bench while the clock was striking nine: adjusting his robes he at the same time secretly disposed of "his black cap so as to have it in readiness against a sad event which . . . his Lordship foresaw was but too likely to happen." The jury was called and sworn and the whole case finished with a verdict of guilty in plenty of time to allow the other two capital offenses to be disposed of before the court rose.

The Assize had been "fixed for Friday—a day always in those times, when practicable, named for capital cases with the humane view of giving . . . as long an interval as possible for carrying into effect the dreadful sentence of the law."

At the common law, the sheriff in the country executed the condemned man within a reasonable time much at his own convenience;¹⁶ but in 1752, the Act, 25 Geo. II, c. 37, provided that the execution should be on the next day but one after sentence unless that day were Sunday and then it should be on the Monday. "It hath been well observed that it is of great importance that the punishment should follow the crime as early as possible."

The Lord Chief Justice sentenced Ayliffe to be hanged on the following Monday, adding, "and that afterward your body be dissected and anatomized." Dissection of the body of a murderer was

trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment."

See also *Waite's case* (1742) 1 Leach, 28; 2 East, P. C. 570; *People v. Harrington* (1871) 42 Cal. 165; *State v. King* (1876) 1 Mo. App. 438.

Layer was an unfortunate Jacobite who published a document construed as traitorous and prepared for an armed uprising in Essex. Sir John Pratt, L. C. J., refused to direct his feters to be struck off till it came to actual trial: see p. 130. He was convicted and executed: pp. 321, 322. The reference to *Layer's case* in Lewis' edition of Blackstone Bk. IV p. 332 (1715) is inaccurate: it is given State Trials vi 230 instead of 16 St. Tr.

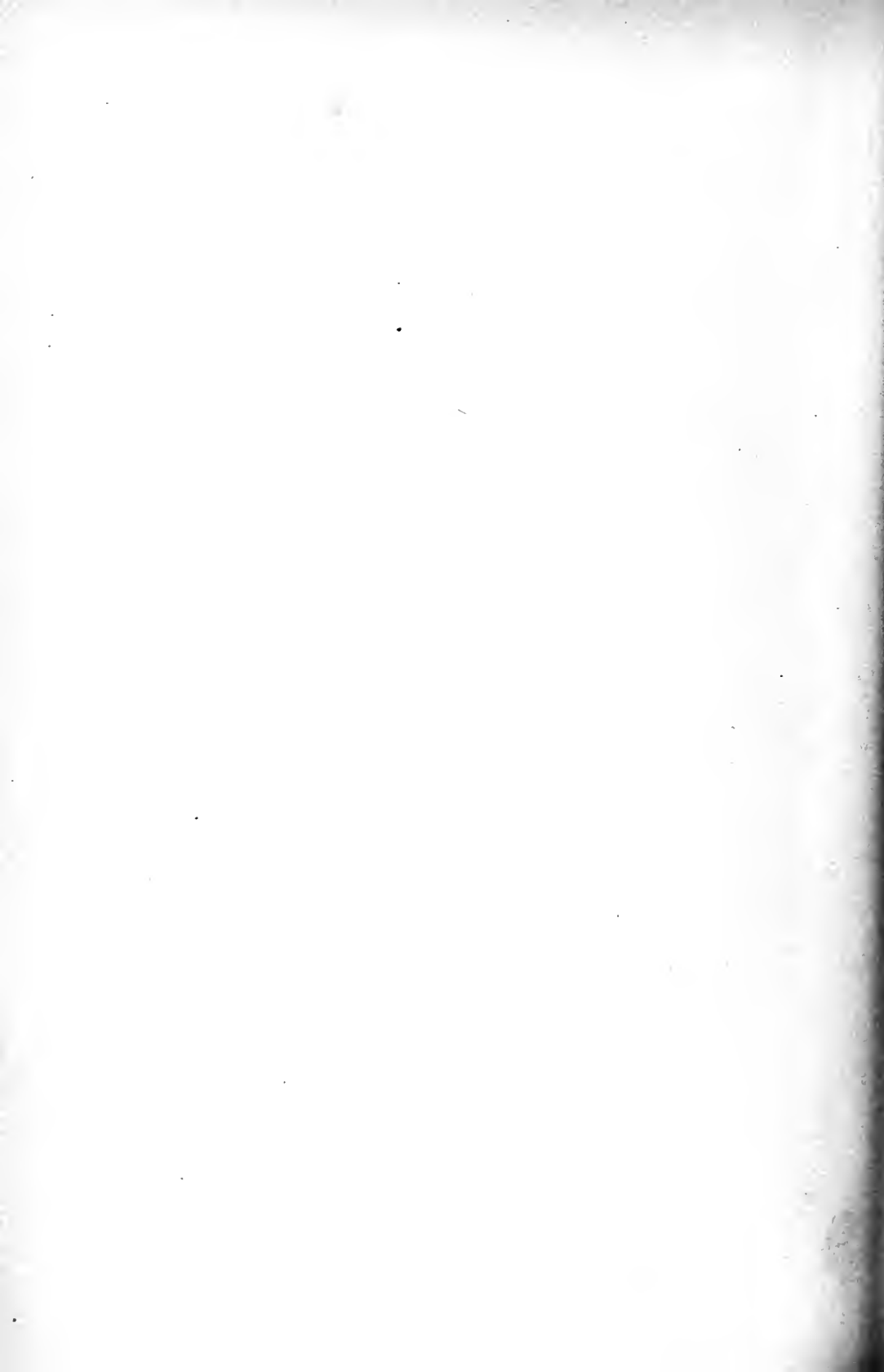
16. The "Mirror of Justices" says that King Alfred hanged Horn because he hanged Swein on a prohibited day, but Sir Frederic Maitland has effectually destroyed the credit of that marvelous book. See my Article, "King Alfred's Way with Judges" ILLINOIS LAW REVIEW (June, 1921) 16:147 *sqq.*

first authorized and indeed directed by the statute already mentioned of 1752, 25 George II c. 37, which by section 5 expressly provides that "in no case whatsoever the body of any murderer shall be suffered to be buried unless after such body shall have been dissected and anatomized." This provision of the law prevailed until repeal in 1832 by 2 and 3 Will IV c. 73 s. 16.

Gigantes autem erant super terram (et in Angliâ) in diebus illis—et beluae immanes.

Osgoode Hall, Toronto.

WILLIAM RENWICK RIDDELL.



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Citations are to the official reports, the Reporter System, U. S. L. edition, and to the several sets of selected cases.

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ERRING JUDGES OF THE FOURTEENTH CENTURY

BY WILLIAM RENWICK RIDDELL¹

In the reign of King Richard II, the son of the Black Prince, some of His Majesty's Justices got into serious trouble and one lost his life. The story can be gathered from the old chroniclers and historians, Froissart, Holinshed, Walsingham, Brady, Tyrrell, etc.; Cobbett's State Trials and Parliamentary History contain most of any importance and may be supplemented by Campbell and Foss.^{1a}

In 1386, the king, who had been emboldened by his success in dealing with Wat Tyler's followers a few years before and had

1. [Justice of the Supreme Court of Ontario, Appellate Division.]

1a. I have consulted the following, inter alia: *Holinshed* "Chronicles of England, Scotland and Ireland" in six volumes, Vol 2, England, London, 1807, a reprint of the third volume of "Chronicles beginning at Duke William the Norman . . . First Compiled by Raphael Holinshed." This is the edition here used. *Thomas Walsingham* "Historia brevis ab Edwardo Primo ad Henricum quintum" London 1574 pp. 334 sqq. *Robert Brady* "A Complete History of England, from the First Entrance of the Romans under the Conduct of Julius Caesar until the End of the Reign of King Henry III., Comprehending the Roman, Saxon, Danish and Norman Affairs and Transactions in this Nation during that Time. Wherein Is Shewed the Original of Our English Laws, the Differences and Disagreements Between the Secular and Ecclesiastic Powers, the True Rise and Grounds of the Contentions and Wars with France, the Conquest of Ireland, and the Actions between the English, Scots and Welsh, During the Same Time, 1685." This well known Tory History, commended by Lord Keeper Guildford and the historian Hume, was written at first hand from the tower records, of which Dr. Brady was keeper. Hume is said to have been chiefly indebted to Brady for the facts and principles of his celebrated work. *Evesham* "Chronicon Abbatiae de Evesham ad 1418" London 1863. *Rymer* "Foedera, Conventiones, Litterae" London 1816. *Walsingham* "Journal" Camden Society, London. *Tyrrell* "Bibliotheca Politica" 2nd ed. London 1827. *Cobbett* "Complete Collection of State Trials" Vol. 1 London 1809 (1 St. Tr. pp. 87-135); "The Parliamentary History of England," Vol. 1 London 1806 (1 Parl. Hist. pp. 181-216). See also *Lord Campbell* "The Lives of the Chief Justices of England" London, 1849 Vol. 1 pp. 96-114; *Edward Foss* "A Biographical Dictionary of the Judges of England" London 1870, under names of Judges; "Dictionary of National Biography" London (D. N. B.), under the various names.

launched out into wild extravagance coupled with outbreaks of malignant temper, had disgusted most of his subjects by his conduct. He was, indeed, young—being not yet twenty—and he was borne with for a time: but he had gone too far² and his wings had to be clipped. On October 1, 1386, Parliament met; and some of those who had advised and encouraged him in his unwise course were dismissed from office, while Michael de la Pole, Earl of Suffolk and Lord Chancellor of England, was impeached.³ Not satisfied with this, Parliament placed the administration of the affairs of the king and kingdom for a year in the hands of a commission, to whom the king issued letters under the great seal for the purpose.⁴ This was expressly "for the ordering and disposing of public affairs, according as to them should seem best and most necessary for the desperate estate of the Commonwealth, to depress civil dissensions, and to pacify and appease the grudgings of the people."⁵

2. He had become what in Canadian terminology is called "brash."

3. The articles of impeachment are given in 1 St. Tr. pp. 91-94; they are not very serious. This was the first instance of the impeachment of a lord chancellor; he was convicted and sent to prison at Windsor and all his lands were confiscated: 1 St. Tr. 94. *Campbell* "Lives of the Lord Chancellors" Philadelphia 1851 Vol. 1 pp. 250-255, gives a good account of de la Pole, who seems to have been of superior character and calibre.

4. The statute is (1386) 10 Ric. II c. 1: the commission is in Rotuli Parliam 10 Ric. II pt. 1 M 7 and is copied in 1 Parl. Hist. 191-193 and in part in 1 St. Tr. 94 note (c). The important parts are as follows: "That the king of his own free-will, and at the request of his Lords and Commons had changed the Great Officers of the crown above mentioned, for the good government of the kingdom, the good and due execution of the laws, and in relief of his own state, and ease of his people; and had appointed eleven Commissioners, viz., William, archbishop of Canterbury, Alexander, archbishop of York, Edmund, duke of York, and Thomas, duke of Gloucester, William, bishop of Winchester, Thomas, bishop of Exeter, Nicholas, abbot of Waltham, Richard, earl of Arundel, John, lord Cobham, Richard le Scrope and John Devereux, to be his great and continual Council for one year next coming, after the date of these letters patent: by which he gave them power to survey and examine all his Officers, Courts, Household, and the Government of the whole kingdom, to receive all his Revenue, as also all Subsidies, Taxes, and other Payments; to do what they would in the kingdom, and to amend all things according to their discretions. . . . Commanding and charging all prelates, dukes, earls, barons, the steward, treasurer and comptroller of his household, the justices of one bench or the other, and other his justices whatsoever, barons and chamberlains of the exchequer, sheriffs, escheators, mayors, bailiffs, and all other his officers, ministers and lieges whatsoever, that they should be attending, obedient, counselling and assisting to the said councillors and officers, so often and in what manner they should direct."

5. 1 St. Tr. 94; 1 Parl. Hist. 191-193. The author of the commission is not known: Sir Robert Belknappe, Chief Justice of the Common Pleas was charged by Alexander Nevill, Archbishop of York, with being the author; and he did not deny or admit the charge. 1 St. Tr. 119—but it was understood at the time that the real author was Sir Robert Tresilian, Chief Justice of the King's Bench—*sed qu.* 'Grudgings' is what the old *Promptorium Parvulorum* calls 'grutchynge' or 'groching' and translates into Latin 'murmur'; it is our 'grouching' or 'grousing.'

As was to be expected, the king did not like this although he had been obliged to consent to it; and with the advice and assistance of evil counsellors, he set himself to get rid of the incubus. To understand the story, the state of the kingdom must be borne in mind. The former advisers and favourites of the young king had been deprived of all power—this had by statute and commission been vested in others—but they still had their followers in the country. There were two factions, the Ins and the Outs, as now—but then the game of politics was a grim one, not only the power but the estate and the head of the players being at stake.

The leaders of the Outs were Alexander Nevill, Archbishop of York, Michael de la Pole, Earl of Suffolk, former Lord Chancellor, Robert de Vere, Duke of Ireland, Sir Nicholas Brembre (or Brambre), and Alderman of London, and Sir Robert Tresilian, chief justice of the Court of King's Bench. Of these five we are chiefly concerned with the last—the one chief justice who was hanged.

Probably a Cornishman,⁶ he was educated at Oxford and became a fellow of Exeter College. Selecting the legal profession, he was created a serjeant-at-law and, May 6, 1378, a puisne justice of the Court of King's Bench. Attaching himself to de Vere, he was, June 22, 1381, appointed chief justice of this court. He distinguished himself for learning and diligence as well as impartiality and vigor. We are given an example of his vigor in his treatment of the Essex rebels, on his mission to try whom the king accompanied him. It is said, as they were journeying, "the Essex men in a body of 500 addressed themselves barefoot to the king for mercy, and had it granted upon condition that they should deliver up to justice the chief instruments of stirring up the rebellion, which being accordingly done, they were immediately tried and hanged, ten or twelve on a beam, at Chelmsford, because they were too many to be executed after the usual manner, which was by beheading."⁷ It is said that

6. *Lord Campbell* "Lives of the Chief Justices" Vol. 1 p. 96; although he quotes this statement as to Tresilian's birth place from the *Gentleman's Magazine* Vol. 64 p. 325, he says: "I suspect that he is assigned to Cornwall only on the authority of—"

"By Tre, Pol, and Pen,
You know Cornishmen!"

But it is known that he had large estates in Cornwall and that he had practiced as an advocate there. *Foss* p. 670.

7. *Kennet* "Complete History" Vol. 1 p. 248, quoted in *Campbell* op. cit. p. 97. Some of the rebels were to be tried at St. Alban's. "To that town he accompanied the king and the mode of trial he adopted was somewhat novel. He forced one jury of twelve to present the ringleaders, according to a list previously prepared; a second jury was next empaneled who confirmed the finding of the first, and then the same course was adopted with a third jury. No witnesses appear to have been examined but every party

there never was any complaint against him in civil matters; in that regard he resembled the notorious Lord Jeffreys. He was soon in the inner circle of the king's friends—and narrowly escaped being impeached in 1386 along with the chancellor. That he escaped by intriguing with the dominant party seems certain; that he actually drew the statute and commission is more doubtful. However, he was not admitted as one of the commissioners and had to content himself with his judicial position. He was not satisfied with remaining quiet, and so he united with the rest of his party in an attempt to regain power.

Why the king and his counsellors did not wait until the termination of the year for which the commission was to run has never been explained and remains as great a mystery as ever. But apparently, they got the impression that the commission had become unpopular in the country. However that may be, a council was called at Nottingham where the king had his court, the chief personages being the five already mentioned, including Tresilian, they being those in whom the king had implicit confidence. The council sent for the sheriffs of the neighbouring counties to see what forces could be raised to assist the king against the commissioners: but received a rude shock when the sheriffs stated that the people generally were persuaded that the commissioners sought the good of the nation in all they did, and that few could be gotten to oppose them. All hope of success by arms was not abandoned; but another tack was immediately taken to obtain the object by civil legislative means. The sheriffs were ordered to return none as knights or burgesses to the next Parliament but those who were nominated by the king and his council. The disconcerting reply was made that "The people would be very hardly deprived of their ancient privileges of choosing their own members of Parliament; and that if there was a true freedom observed in choosing it would be almost impossible to impose any person against the people's liking, especially since they would easily guess the design and stand the more resolutely upon their right."⁸

charged was condemned on the personal knowledge of these thirty men." *Foss* loc. cit., quoting from *Newcome* "St. Albans" 263. Credat Judaeus Apella—non ego. I take the liberty of disbelieving this story; it looks like a traditionary rendering of a layman's description of a speedy indictment by grand jury, followed by a speedy conviction by petit jury, the third jury being thrown in for good measure—perhaps because a petit jury could be tried by another jury in an attain. That the juries proceeded on their own knowledge is wholly credible; that was their duty and the reason why they were called from the vicinage.

8. See the delectable story in 1 Parl. Hist. 193, 194. No wonder "this answer of the sheriffs somewhat startled the council."

Being disappointed in the hopes of Parliamentary relief by a packed house, the council turned to the third plan which, had it been honest, should have been the first—that is, recourse to law to declare the commission invalid. And now Tresilian plays the leading rôle.

After some preliminary and tentative proceedings at Shrewsbury, the king sent a summons to all his judges as well as his serjeants-at-law⁹ to attend at his court at the castle at Nottingham on August 25, 1387, to advise the king as to the law. The proper course was for the king to submit his questions in writing, and for the judges to consider them in camera and give answers under their hands and seals. But when they met, they were presented not only with the questions but also with the answers prepared by Tresilian; he had already signed and insisted on their signing also.

Sir Robert Belknappe, Chief Justice of the Common Pleas, strenuously objected—and for very good reasons, even aside from law. The Archbishop of York in his chamber at Windsor had charged him with drawing up the obnoxious statute and commission and told him that for that reason “he hated him above all men; and that if he found not some way to make void the said statute and commission he should be slain as a traitor.” To this Belknappe had turned a deaf ear as he did to the king, who on two occasions had sought his aid;¹⁰ and he knew that his only protection was that of the commission.

But the Duke of Ireland and the Earl of Suffolk added their threats to those of the Archbishop of York, and to save his life, the unfortunate chief justice signed. He turned to those whose threats had compelled his compliance and said, or, as the old chronicler has it, “he burst out into these words, ‘Now (said he) lacketh nothing but a rope, that I might receive a reward worthie for my desert, and I know if I had not doone this, I might not have escaped your hands so that for your pleasures and the king’s I have doone it and deserued thereby death at the hands of the Lords (Commissioners)’.”¹¹

9. This was a perfectly regular proceeding although now long obsolete. It was such a meeting with respect to ship money which got the judges into trouble in the time of Charles I. In 1387, the judges had just returned from the summer assizes when they were summoned.

10. 1 St. Tr. 119; 1 Parl. Hist. 210, 211. The fact that in telling this story in 1388 on his impeachment, Belknappe did not claim to have written the statute and commission is nearly conclusive against the idea; and we are rather driven to consider Tresilian as the actual author.

11. So *Holinshed* op. cit. Vol. 2 p. 782 (original ed. iij, p. 456). *Holinshed* by a curious slip adds:—“Which indeed shortly followed, for in the next parliament he was condemned and executed.” Belknappe was indeed condemned to death as a traitor, but he was not executed. This *Holinshed* himself says, p. 796. Another account makes Belknappe say to de Vere and de la Pole: “Now I want nothing but a ship or a nimble horse or a halter to

Similar pressure—as they afterwards claimed—was brought to bear upon the other judges there present, and upon the king's serjeant—at all events, they all set their hands and seals to what might well have been their own death warrant. "John Holt, Roger Fulthorp and William de Burgh, knights, justices and associates of the said Rob. Belknappe and John de Lokton the King's Serjeant" set their hands to the fatal document. The King's Bench judges do not seem to have been asked; but Sir John Cary, Chief Baron of the Exchequer concurred, having been present at the meeting at Shrewsbury.

Even a casual perusal of the questions and answers will show that the death of the commissioners or at least of some of their leaders was the end of the proceeding. It will be sufficient to cite some only of the eleven questions and answers; the official document reads:

"Be it remembered, that on the 25th of Aug., in the 11th year of the reign of K. Rich. II, at the Castle of Nottingham before our said lord the King, Rob. Tresilian, chief justice of England, and Rob. Belknappe, chief justice of the common bench of our said Lord the King, John Holt, Roger Fulthorp and Wm. de Burgh, knights, justices and associates of the said Rob. Belknappe, and John de Lokton the King's Serjeant-at-law, in the presence of the lords and other witnesses underwritten were personally required by our said Lord the King, on the faith and allegiance wherein to him the said King they are bound, to answer faithfully unto certain questions hereunder specified, and to them then and there truly recited and upon the same to declare the law according to their discretion, viz.:

bring me to that death I deserve": *Tyrrell* op. cit. Vol. 2 p. 906: *Campbell* op. cit. p. 110. Still another version, that of Froissart, is quoted by *Campbell* op. cit. p. 110: "Now I want nothing but a hurdle and a halter to bring me to that death I deserve. If I had not done this, I should have been killed by your hands: and now I have gratified the King's pleasure and yours in doing it, I have well deserved to die for betraying the nobles of the land." All the commissioners but one were nobles, "lords." The *Eulogium*, a Latin chronicle written about 1450, speaking of this meeting, says: "Isti autem justiciarii fuerunt de consilio dominorum in parlamento praeterito, et unus eorum postquam recesserat de castro dixit, 'Jam meruimus cordas quibus suspendamur, quia timore mortis haec dicta fuerunt et non de veritate'"—now these very justices were of the council of the lords in the preceding Parliament (of 1386); and one of them after he had gone from the castle said, "Now we have earned the halters by which we will be hanged, because these answers were given from fear of death and not from truth." "An English Chronicle . . . written before 1471" Camden Society, London, 1856, p. 122. This very interesting chronicle (1377-1461) has valuable notes by the Rev. John Silvester Davies, M. A.

That Belknappe was hanged was certainly a tradition in the profession, although an error. In an Irish case in 1689 in 12 Howell's State Trials 612 we find the chief justice speaking of it. When Chief Justice Keating was asked by crown counsel to do something which he considered illegal the chief justice said: "Sir, I will not be hanged for anybody"—"Mr. Fitzpatrick, I will not be hanged with Justice Belknap nor Tresilian, neither."

1. It was demanded of them, 'Whether that new statute, ordinance and commission made and published in the last parl. held at Westm. be not derogatory to the royalty and prerogative of our said lord the King?' To which they unanimously answered that the same are derogatory thereunto, especially because they were against his will.

2. 'How those are to be punished who procured that statute and commission?' A. That they were to be punished with death, except the King pardon them.

3. 'How those are to be punished who moved the King to consent to the making of the said statute?' A. That they ought to lose their lives unless his Maj. would pardon them.

4. 'What punishment they deserved who compelled, straightened, or necessitated the King to consent to the making of the said statute and commission?' A. That they ought to suffer as traitors.

5. 'How are those to be punished who hindered the King from exercising those things which appertain to his royalty and prerogative?' A. That they are to be punished as traitors.

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7. 'Whether the king, whenever he pleases can dissolve the parl. and command the lords and commons to depart from thence, or not?' A. That he can; and if anyone shall then proceed in parl. against the King's will he is to be punished as a traitor.

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"In testimony of all which, the judges and serjeants aforesaid, to these presents have put their seals in the presence of the rev. lords, Alex. abp. of York, Rob. abp. of Dublin, John bp. of Durham, Tho. bp. of Chichester, and John bp. of Bangor, Rob. duke of Ireland, Mich. Earl of Suffolk, John Rypon, clerk and John Blake, esq.; given the place, day, month and year aforesaid."¹²

This meant that the commissioners were traitors and the king could do what he pleased, with or without Parliament. It is impossible that any of the judges or the king's serjeants believed in the law so laid down; and none of them (except Tresilian) ever pretended that he did. These judges, then, albeit to save their lives—if so it was—were guilty of the charge laid against the judges of Charles I—unjustly, as I think—of giving an opinion to the king against what they knew to be the law.

Armed now with what was believed to be a competent weapon to destroy the hostile lords, the king collected what force he could and tried to entrap them. The most important of the lords, he whose death was most ardently desired, was the king's uncle, Thomas, Duke of Gloucester; but the other four leaders, Henry, Earl of Derby, Richard, Earl of Arundel, Thomas, Earl of Warwick, and Thomas, the Earl Marshall, Earl of Nottingham, were also in view.

12. *Campbell* op. cit. pp. 98-100; 1 *Parl. Hist.* 194-196; 1 *St. Tr.* 107, 108.

It is not at all unlikely that if the proceedings at Northampton could have been kept secret, as was intended—for the signatories were sworn upon pain of death “to conceal this matter as the council of the king”—the plot would have succeeded. But Sir Robert Fulthorpe, one of the judges, determined to cast an anchor to windward; breaking his oath of secrecy, he immediately told the story of what he had done to save his life to the Earl of Kent, then to the Earl of Northumberland, bidding them inform the chancellor and commissioners. They did so, and then they collected an army greater than that of the king, the king having failed to raise the citizens of London. The army of the lords appeared in Haringay Park, near Highgate and close to the walls of London, and the five leaders “appealed” the five favourites of high treason. The king, dismayed, assured them of a full hearing in the next Parliament, which he called for February 3rd.¹³

The king tried to load the dice by inserting a clause in the writ of election directing those to be returned, “that were the most indifferent in the present disputes”; he was forced by the lords to recall these writs and to issue writs in ancient and proper form.

Parliament met on the day appointed; but all the notables were not present—de la Pole had fled to Calais, “counterfeiting himself to be a poulter and to sell certeine foule which he had gotten . . . he had changed his apparell and shauen his beard”; de Vere, the Duke of Ireland, had raised an army, “Chessiremen and othir” which had been met by “the V lordis beside Oxenforde” at Ratcote Bridge, and they had “bettyn the Chesshiremen and droof thaym hoorn agayne,” whereupon the Duke “fledde ouer the Thamyse in to the yle of Shepye and fro thennez . . . to Almayne and nevir cam agayne”; “maister Alisaundre Nevile, Archebisshope of York, fledde also ouer se . . . and cam neuer agayne.”¹⁴ Tresilian was nowhere to be found; but stout Sir Nicholas Brembre, Alderman of London, would not leave his city for man or devil. On the first day of the session of Parliament an order was made for the arrest of all the erring judges; and all except Tresilian, who had disappeared, were shortly afterwards arrested as they sat in their courts. This Parliament, the “Merciless Parliament,” or “Wonder-working Parliament” as it was variously called, wasted no time.¹⁵

13. “The Morrow after the Purification of Our Lady”—as the year began March 5, this day was in 1387: we now write the date February 3, 1387-88.

14. *Holinshed* op. cit. Vol. 2, p. 788: “English Chronicle” ut supra, p. 5 and notes.

15. One rather wonders what such a Parliament would have thought of the Parliament at Ottawa, or the Congress at Washington in this year of grace, 1927, 538 years later.

The five lords stood up and made their appeal against the five late ministers; all the members of Parliament, "prelates, lords and commons," took an oath to support them, and, Easter being near, Parliament adjourned for a few days. On reassembling, the five lords exhibited articles of impeachment against the five ministers (including Tresilian). The articles of impeachment, thirty-four in all, are interesting reading;¹⁶ so far as we are here concerned, it is sufficient to say that Tresilian was charged with many acts of treason, but one of the most serious of the counts was "constraining the . . . justices to put their hands to the answers to certain questions . . . that by means thereof, the persons then about the king might have colour to put to death the Duke of Gloucester and other lords. . . ."

Not appearing, Tresilian was, on February 13, found guilty of treason along with the other absentees, archbishop, duke and earl; and they with "othir were iugid to be drawe and hanged." The story of his execution is variously told—one account is that he "had taken sanctuary in Westminster (and) was dragged and suffered death on the 19th."¹⁷ Others say, that being safe with the king and the duke at Bristol, he volunteered to find out for them what was going on, and came in disguise to Westminster, put up at an alehouse or an apothecary's shop opposite the palace where he could observe everything that went on, and was recognized by a squire of the Duke of Gloucester. The squire pretended to believe him when he insisted that he was a farmer on Sir John Holland's estate in Kent, but went and told the duke who sent guards at once and captured him.¹⁸ Another account is that instead of flying to a distance like archbishop, duke, and earl, he came to the neighbourhood of Westminster hall on the first day of Parliament, and, even after his own attainder, his curiosity induced him to remain to watch the fate of his associate "Sir Nicholas Brembre . . . that when the trial of Brembre was going on, Tresilian came down from the top of an apothecary's shop adjoining the palace to the gutter to see what was going on, and was recognized by certain peers who sent guards to arrest him; they found him hidden under a round table, his hair and beard overgrown, more like an old beggar than a judge."¹⁹ Holinshed, with his usual terse directness, says:

16. They are given at length in 1 St. Tr. 101-112 (39 in all)—a little different in form in 1 Parl. Hist. 198-207 (34 in all).

17. So *Davies* "English Chronicle" ut supra, p. 149.

18. So *Foss* op. cit. pp. 671, 672; *Froissart* "Chronicles" pt. 2 fol. 110—1 St. Tr. 116 note (c), adds particulars.

19. 1 St. Tr. 115, 116: followed by *Lord Campbell* op. cit. pp. 104, 105.

"Shortlie after (his attainder) was the lord chiefe justice Robert Trisilian found in an apothecary's house at Westminster lurking there, to understand by spies dailie what was doone in the parlement; he was descried by one of his owne men and so taken and brought to the duke of Glocester who caused him forthwith the same daie to be had to the tower and from thence drawne to Tiburne and there hanged."²⁰

There is a discordance even as to how he died—Froissart says that he was beheaded and hung on a gibbet²¹ but this is certainly a mistake. He suffered death as a traitor; he was first drawn on a hurdle from the Tower to Tyburn at the horse's tail with his back towards the horse and at Tyburn he underwent the hideous common law punishment for high treason.²² Were the subject not so ghastly, what would be an amusing account is given of his execution—his hurdle was stopped every furlong to see if he would confess anything but he did not—he refused to mount the ladder to be hanged²³

20. *Holinshed* op. cit. Vol. 2 p. 794. This perfectly plain statement seems to me most probably the true one, but everyone is as competent to guess or judge as I. *Holinshed* at the same place says that Brembre had in the days of his enjoying the king's favor, devised "a common axe to strike off the heads of them which should resist his will and pleasure"; and when he was "found giltye (he) had iudgement neither to be hanged nor drawne but to be beheaded with his owne axe which before he had deuised: serueng him heerein as Phalaris the tyrant sometime serued Perillus, the inuentor of that exquisite torment of the brasen bull . . . of which strange torment, Pêrillus himselve tasted . . ." and he cites Ovid "Vt Phalaris tauro violentus membra Perilli Torruit, infelix imbuat autor opus" *Ars Amoris*, lib. 1, v. 653. Moderns would mention Dr. Guillotin and the guillotine, or cite Shakespeare's "engineer hoist with his own petard."

21. *Chronicles*, pt. 2, fol. 110—see *Campbell* op. cit. p. 108.

22. The *English Chronicle*, ut supra, tells us, p. 60, of the execution, Saturday, November 18, 1441, of Roger Boltyngbroke for "tresoun ayens the Kynges (Henry VI) persone"—"he was drawne fro the tour of Londoun unto Tyburne; and there he was hanged and leet doun half alive and his bowellis taken out and brent and his hed smyte of and set on London brigge and his body quartrid and sent to certaine townes of Englund, that is to saye, Oxenforde, Cambrigge, York and Hereforde."

Before me as I write, I have the official record of the Court of Oyer and Terminer and Gaol Delivery holden at Ancaster, Upper Canada (now Ontario) in May and June, 1814, at which fifteen persons were convicted of high treason. Under date, Tuesday, June 21, 1814, in the handwriting of John Small, Clerk of the Court, is found the sentence pronounced upon the unhappy men by my kinsman, Chief Justice Thomas Scott: "That you (repeating the names of all the prisoners) and each of you be taken from the place whence you came and from thence you are to be drawn on hurdles to the place of execution where you are to be hanged by the neck but not until you are dead for you must be cut down while alive and your entrails taken out and burnt before your faces, your heads then to be cut off, and your bodies divided into four quarters and your heads and quarters to be at the king's disposal—and God have mercy on your souls."

23. The Reverend Dr. Scadding in his "Toronto of Old," Toronto, 1878 at p. 99, gives an account of an execution before 1823 at the Old Jail, Toronto, when the condemned man refused to mount the scaffold, resisting the entreaties of sheriff and chaplain.

till he was soundly beaten with bats and staves and forced up—then he said, "So long as I do weare anything upon me, I shall not die"; and the "executioner stripped him and found certain images painted like signs of the heavens and the head of a devil painted and the names of many of the devils wrote in parchment; these being taken away, he was hanged up naked" ²⁴—even then, they had to cut his throat and let him hang till morning.

Having disposed of the leading malefactors, the commons turned to the minor criminals. On March 2, they impeached the five judges and the king's serjeant "for putting their hands and seals to the questions and answers given at Northampton . . . to cover and affirm . . . high treasons. . . ." They pleaded that "They could not deny but that the questions were such as were then asked but the answers were not such as they put their seals to"—the common law plea, *Non est factum*, under which from the earliest times duress could be proved to avoid the deed.²⁵ Chief Justice Sir Robert Belknappe took up his defense by relating the circumstances under which he had signed—as already stated—and "prayed for the love of God, he might have a gracious and merciful judgment." Sir John Holt "alleged the same matter of excuse and made the same prayer, so did Sir William (de) Burgh and Sir John Cary . . . as did also Sir Roger Fulthorpe and John Lockton, Serjeant-at-law"; but the commons were inexorable and asked that they might all "be adjudged, convicted and attainted as traitors." The lords temporal²⁶ so determined; and they all, including even Fulthorpe, were attainted traitors. The "Merciless Parliament" indeed! The lords spiritual when the trial was going on "were retired into the king's chamber"; when they found what the judgment was they "arose hastily and went into the Parliament house, pouring forth their complaint before the king and peers, humbly upon their knees beseeching them that for the love of God, the Virgin Mary and all the Saints, even so as they hoped to have mercy at the Day of Days, they should show favour and not put to death the said judges then present." The five great leaders had their hearts mollified and joined in the prayer; the lives of the unfortunates were saved, but not their estates or liberty. Back to the Tower they went for perpetual imprisonment; but, six days later, March 12, they were all banished to Ireland for life with a yearly allowance

24. 1 *St. Tr.*, 117, 118.

25. This doctrine is certainly as old as 1199.

26. The spiritual lords did not sit in such cases involving the shedding of blood—no one in those days was acquitted on an impeachment.

of £20 and two servants—it is said that the queen interceded for them with partial success.

Belknappe and Holt were sent to Dromore²⁷ in Ireland, not to go more than two miles from it under penalty of death; and the king allowed Belknappe £40 and Holt 20 marks (£13.6.8). Belknappe was later removed to Dublin, and after nine years' exile was allowed to return to London and practice law; his attainder was never reversed but some of his estates were restored to him. He died in 1400. Holt's sentence of banishment was remitted by Parliament in 1397 and he was allowed to return to England; in the following year, his attainder was reversed; he died in 1418.

Fulthorpe and de Burgh were sent to Dublin with an allowance of £40 each, the former to have a three-mile limit, the latter two miles. Fulthorpe seems to have died before 1397 in exile; his lands were subsequently restored to his family. De Burgh was allowed to return in 1397; the next year, his attainder was reversed; and in 1403, King Henry IV returned his forfeited lands.

Cary and Laxton were sent to Waterford with a two-mile limit, and an allowance of £20 each. Cary died in exile probably in 1397, but his property was restored to his family by King Henry IV in 1402. Of Laxton (Lacton, Lokton, Lockton, or Lakton) nothing is known.

These men were hardly used. It is, indeed, hard to believe that the sentence to an ignominious death was intended to be carried out or that the dramatic scene in the House of Lords had not been planned in advance to impress the people; but the lesser punishment was in itself rather severe for an offense committed under duress. The treatment of Fulthorpe looks like base ingratitude which is but little alleviated by the gift said to have been made to his son of £40 per annum for life out of his father's forfeited estates.²⁸

But the actual treatment of the judges and serjeants was lenity itself compared to that of John Blake and Thomas Usk. Blake, a barrister, was charged with drawing the questions; and it was in vain that he pleaded that he was retained by the king and all he did was at the king's command—he was drawn and hanged as a traitor. The same fate came to Thomas Usk who had got himself made

27. 1 St. Tr. 119-122. More probably Drogheda. *Rymer* op. cit. VII, p. 591, calls it "Drouda"; Foss, who strangely enough does not mention Belknappe at all, says Holt was sent to Drogheda—op. cit. p. 351. Campbell, op. cit. p. 113, says Belknappe was sent to Drogheda. 1 St. Tr. 120, note(q) has Dromore.

28. *Foss*: *Judges of England*, p. 284. The son later got some of the estates by paying a fine of 1000 marks (£666.13.4).

under-sheriff of Middlesex to arrest the lords, although it was also at the king's command.²⁹

I have anticipated in order to set out the punishment of these unfortunates and its termination.

But of a surety "time brings about its revenges"—nothing was ever stable in England in those days. In time it came about that the mighty Duke of Gloucester lost power and with his associates was himself charged with treason—dying (being murdered, indeed) he was, in 1397, convicted post mortem. And now the Parliament, the "Grete Parliament" or "Great Parliament" was of a different kind. Meeting at Shrewsbury,³⁰ January 27, 1397-98, the new lords appellants read the questions and answers of Nottingham

"before the king, lords and commons . . . and all said, 'They thought the judges had made and given their answers duly and lawfully as good and liege people of the king ought to do' after which Sir Tho. Skelton learned in the law, Wm. Hankeford and Wm. Brenckly the king's sergeants said, 'The answers were good and lawful, and if the same question had been put to them they would have given the same answer.' William Thirning, chief justice of the king's bench said 'The declaration of treason, not already declared, belonged to parl.; but, were he a lord, or peer of parl. and had been asked, he would have spoke in the same manner.' So, likewise Wm. Rickhill, a judge of the common pleas and Wm. Clopton, chief justice of the common bench, answered and affirmed the same things: therefore, the former answers

29. 1 Parl. Hist. 211, 222; 1 St. Tr. 120, 121.

30. So says 1 Parl. Hist. 233, but *Ruffhead* "Statutes at Large," Vol. 10, appendix x, p. 387, says that it was at Westminster the Monday next after the Exaltation of the Cross and it was adjourned to Shrewsbury. It was for the "Great Parliament" that King Richard II built the Hall of which we read in *Strype's* "Stowe's Survey" ij, lib. vi, p. 49, as follows:

"In the year 1397, the great hall at Westminster, being out of reparations, and therefore new builded by Richard II; he having occasion to hold a parliament, caused a large house to be builded in the midst of the palace court betwixt the clock-tower, and the gate of the old great hall. This house was very large and long, made of timber covered with tiles, open on both sides and at both ends, that all men might see and hear what was both said and done. The king's archers, in number 4,000 Cheshire men, compassed the house about with their bows and arrows notched in their hand, always ready to shoot. They had bouch of court (to wit, meat and drink) and great wages of 6d by the day. The old great hall being new builded, parliaments were again there kept as before, namely one in the year 1399 for deposing Richard II" or as *The Early English Chronicle* puts it, p. 9: "In the xxj yeer of king Richard, he ordeyned and held a parlement at Westmynstre that was callid the grete parlement and this parlement was maad onli forto sle the erlle of arundelle and othir, as thaym likid at the tyme. And for their jugement, the kyng leet make a long and large hous of tymber in the paleis of Westmynstre that was called at Hale; couered with tiles; and open on bothe side and atte endis, that alle men myghte se thorough; and the king commaundid eueri lord, knyghte, and squier, forto bryng with thaym thair retenue, and come to parlement as strong as thay myghte."

of the judges, in the 11th year of the king were judged and held to be sufficient by this parl. Then, by the assent of the Lords spiritual, and temporal the procurators of the clergy, and the whole body of commons, by and with the advice of the judges there present, it was decreed, ordained, and established 'that the parl. holden the said 11th year, shall be clearly annulled and held for none, as being done without the authority and against the will and liberty of the king, and the right of his crown; and that all the judgments, statutes and ordinances, made in the same with all things depending upon them, shall be revoked and annulled, reversed and repealed, and held for none; and that all lands, tenements, fees, advowsons and other possessions seized as forfeit, by colour of the said judgment shall be restored and delivered to them who were condemned or put out or else to their heirs; and to them that have any cause of action, or title of right, all manner of liberties and franchises as they had at any time with restitution of their goods and chattels."³¹

Then came a statute, which after setting out in Latin the questions and answers, says "qe leur sembloit qe les ditz justices firent & donerent leur responses duemont and loialement come bones & loialx liges du Roy deveroient faire"—that is, appears to them (i. e., "le Roy, Seignurs & les communes"—king and lords and the commons) that the said justices made and gave their answers properly and lawfully as good and loyal subjects of the king should do, and gives the opinions of Thomas de Skelton learned in the law, William Hankeford, and William Brenchesle, king's serjeants, Monsieur William Thirnyng, chief justice of the Common Bench, Monsieur William Rikhull justice of the Common Bench, and Monsieur Wauter Clopton, chief justice of the King's Bench; then it annuls all the proceedings of the former Parliament and directs the restitution of the estates of the judges.³² To make this wholly effective, another statute was passed that "Whosoever shall pursue to repeal any of these statutes . . . shall be adjudged a traitor."³³

One cannot but see that this, the last Parliament of Richard II, prepared the way for a certain downfall—like another monarch of our own day, he could say: "There is but one will in the realm, and that is mine: him who opposes me I will crush." And the downfall was as speedy and complete—*Quem Deus vult perdere prius dementat*.

These last named judges and others had their reward.³⁴ But

31. 1 Parl. Hist. 233, 234.

32. (1397) 21 Ric. II, c. 12.

33. (1397) 21 Ric. II, c. 20.

34. William Hankford became a justice of the Common Pleas the same year and of the King's Bench in 1413—he died in 1422. The story goes that tired of life, he gave instructions to his gamekeeper to shoot anyone

one must concede, when all is said, that it is distinctly safer to be the justice of His Majesty, King George V, than it was to be a justice of His Highness, King Richard II³⁵—even if it is less exciting.³⁶

in his grounds at night who would not stand when challenged and himself so acting was shot.

William Brenchesley became justice of the Common Bench the same year, retaining the place until 1406 in which year he died. William Thirning already a chief justice was wise enough to seek the favor of Henry IV and was continued in his place; he died in 1413.

William Rickhill is called by Coke, an Irishman—a family tradition makes him a Riddell, and he undoubtedly had one of the family estates in Kent; in 1389 he became a justice of the Common Bench in the place of some of those attainted. He continued such till 1407 after narrowly escaping impeachment on the accession in 1399 of Henry IV.

Walter de Clopton became Chief Justice of the King's Bench in 1388 on the attainder of Tresilian—he resigned in 1400 to "make his soul" as a minor friar; R.I.P.

35. It is said that Henry VIII was the first king of England regularly to employ the title "Majesty."

36. A passing reference has been made to Chief Justice Jeffreys—it may not be without interest to note that Tresilian's case was cited to the court in a case in which Jeffreys was counsel.

In the second part of a very curious work, often attributed to Titus Oates: "*A Display of Tyranny; or Remarks Upon the Illegal and Arbitrary Proceedings in the Courts . . . From . . . 1678 to . . . 1688 . . .*" London, 1689 (2d part, 1690), is a report of the argument in the case of *The King v. Edward Fitz-Harris* in May, 1681, before the Court of King's Bench composed of Chief Justice Pemberton and Puisné Justices Jones, Dolben and Raymond. Fitz-Harris had been impeached for high treason at the preceding session of Parliament held at Oxford, by the House of Commons in the name of all the Commons of England, but Parliament being dissolved late in March, 1681, the impeachment could not be proceeded with. On April 27, he was indicted for high treason and a true bill found by a grand jury of Middlesex. On being arraigned at the King's Bench bar, he pleaded to the jurisdiction, claiming that pending impeachment, indictment for the same offense did not lie. The Crown demurred, and the demurrer was argued at bar, Jeffreys (being then serjeant) being of counsel for the king with the attorney general (Sir Robert Sawyer) and solicitor general (Hon. Heneage Finch), Sir Francis Wythens and Mr. Saunders. Mr. Williams, counsel for the prisoner (along with Sir Francis Winnington, Mr. Pollexfen and Mr. Wallop), said (p. 77):

"I think it will not be denied, but that the *Commons* may Impeach any *Commoner* before the *Lords*. That was the Case of Tresilian and Belknap, in the time of Richard the second; Upon that Impeachment, one of them was Executed and the other Banished in Parliament."

Sir Francis Winnington said, (pp. 89, 90),

"We find 11 *Rich. 2, Rot. Part. part 2, and Rushworth, part 1 in the Appendix, 51, Tresilian and others were appealed against for Treason, the Judges of the Common and Civil Law were called by the King to advise of the matter; they all agreed, that the Proceedings were neither agreeable to Common, or to Civil Law; But, the Lords said it belonged not to those Judges to guide them; but they were to proceed according to the Course and Law of Parliaments; and no opinion of theirs, should oust them of their jurisdiction.*"

The Attorney General (p. 110), also mentioned the case:

"The Case of 11 R. 2, will be nothing to our purpose at all; that was in the Case of the *Lords Appellants*; a proceeding contrary to Magna Charta,

contrary to the statute of Edw. 3, and the known privileges of the Subject. Those proceedings had a countenance in *Parliament*, and they would be controuled by none nor be advised by the *Judges*; but proceed to the trying of *Peers* and *Commoners* according to their own Will and Pleasure. And between the time of 11 R. 2 and 1 H. 4. see what Havock they made by those illegal proceedings and in 1 H. 4, these very *Lords* were sentenced. . . ."

(The Attorney General is a little out in his chronology. It is a satisfaction, however, to see that King Richard tried to save the erring judges.)

The court (Dolben, J., dubitante) held the plea insufficient. Fitz-Harris pleaded not guilty, had his trial at bar, Jeffreys being one of the prosecuting counsel, was convicted and "was sentenced to dye as a Traytor which was Executed the 1st of July, 1681."

ERRING JUDGES

OF THE

THIRTEENTH CENTURY

The Royal Historical Society (of London) has published much material of great interest to lawyers—a humble Fellow, I think none is more interesting than that published in 1906: “State Trials of the Reign of Edward the First, 1289-1293.”

The subject is the investigation into the alleged cruelty, injustice and venality of the Royal Officers, great and small, in England, during the absence of the King in Gascony, 1286-1289—among them some of the Judges. It is well known to students of legal history that several Judges were accused and some convicted and severely fined—some losing their Commissions as well.

It is, however, gratifying to know that examination of the extant official records enables the learned editors to say that very many charges were found to be without real basis in fact—nevertheless there was a drastic and dramatic weeding out of the judicial Bench which made a great impression; and since that time while there has been in England a sporadic case from time to time until comparatively recent years, of judicial corruption—as witness the deplorable case of Bacon—there has been no complaint of wholesale impropriety.

The earlier instance of drastic and extensive punishment of Judges by King Alfred we now know to be entirely mythical, depending wholly for authority on the lying “Le Mireur a Justices.”¹ The transactions in King Edward’s time, however, are authenticated by extant records, and are mentioned by reliable historians.²

It is not the purpose of this Paper to discuss the matter at large; but only to give some account of certain of the proceedings before the Commissioners or Auditores. I shall not transcribe the original Latin but translate as literally as the idioms of the two languages permit, abbreviating in unimportant matters.

All the Justices of the Bench and especially William de Brompton³ were accused by the Abbot of Roche (a Cistercian Abbey near Rotherham in Yorkshire) and the investigation took a wide course.

The complaint was that one John Paynel, by the maintenance of John of Kirkby then Bishop of Ely whose niece⁴ Paynel had married, had a writ of *precipe in capite*⁵ against William the preceding Abbot of Roche concerning certain land in Roxby in Lincolnshire, and that the writ was returned into Court on the Octave of St. John the Baptist. On this day the Abbot aforesaid was essoigned⁶ and had “a day” 15 days after Michaelmas—(“15 days”

meant a fortnight at the Common Law) on which day he craved a view of the land and had a day 15 days after St. Martin's on which day the Abbot was essoigned and had a day 15 days after St. Hilary's on which day the parties pleaded—so that within the half year four days were given to the said Abbot—against the law and custom of the Realm, according to which in one year only three or in two years only five days could be given in a Writ of Right—to the damage of the said Abbot, etc. This was the first ground of complaint—a status being claimed by the complaining Abbot under the penultimate Chapter of the Statute of Marlborough.⁷

The second ground of complaint was more serious:

When the Justices had on the day last named given Abbot Walter a day the morrow of Ascension Day, Walter died shortly before the return day at Beaulieu (a Cistercian Abbey in the New Forest)—and on the day, monks of Roche came before the Justices and informed them that he was dead “which was testified by true and lawful men and the letters of the Abbots of Beaulieu and of Netley (a Cistercian Abbey on Southampton Water) that they had buried him on Tuesday; but the said Justices did not admit or enrol this evidence,⁸ against the Statute of Westminster II.⁹ but by error and favor adjudged default¹⁰ against the said Abbot after his death. And they directed the issue of a writ called *parrum cape* to seize the land into the King's hand and to summon the Abbot to be before them on the Octave of St. John the Baptist to hear judgment on his default made after appearance. On this day monks of Roche came with monks of Beaulieu before the Justices and said that no default could be made because the Abbot was dead which they were ready to prove—notwithstanding this, the Justices adjudged Seisin of the land to Paynel, no inquisition being had¹¹ and the said Abbot in mercy.”¹²

Damages were claimed for the existing Abbot and his House of £1,000.¹³

William de Brompton, brought before the Commissioners, pleaded that the plea between the (former) abbot and Paynel was before him and his fellows of the Bench and judgment was rendered therein according to the law and custom of the realm—and afterwards on Royal Writ¹⁴ they sent the Record and Process before Ralph de Hengham and his fellows holding Pleas of the Crown¹⁵ “and he says that the said judgment was there affirmed as good according to the law and custom of England—whence it appears that he ought not to be called upon to answer without the said Ralph and his fellows who affirmed the said judgment as good. And he said that

if the Auditores so directed he would answer without them." His dilatory plea was ineffective: he was asked about the essoigns—four days in half a year—and he said that heretofore the Justices of the Bench were accustomed of their own volition to give to the parties more than three days in a year "according to the nearness of the County (Court) before duel waged or the sending of the Grand Assize."¹⁶

As to the evidence of the death of Abbot Walter, predecessor of the present Abbot, he said that he did nothing against the law and custom of the realm—for he said testimony of this kind by letters of Bishops or Abbot is not admissible as authentic (*tanquam autentica*) in the King's Courts except in special cases, that is to say, when the Bishop writes to the Justices of the Bench that a certain person is excommunicated for contumacy or absolved if previously excommunicated and the like.

And moreover, he said that an Inquisition was had on precept of the King concerning the death of Abbot Walter by which Inquisition it was found that he was alive on the day of judgment rendered.¹⁷

The Abbot complainant admitted that it might be that the judgment had been afterwards affirmed by Ralph de Hengham in the (King's) Bench—but claimed nevertheless that it was not good but that Ralph had increased not corrected the wrong done thereby to the Abbot.

William de Brompton then said that if there was any error in the process, it should be corrected by the Auditores: they sent for Record and Process and issued a Precept to the Sheriff of Lincolnshire to have Philip Paynel¹⁸ tenant of the land present before them on the Quinzaine of St. Hilary's Day to hear the Record, etc.—it was accordingly read. Afterwards on the Octave of St. John the Baptist came before the Auditores, the Abbot and also Philip Paynel and Robert de Rowelle the tenants of the land. The Abbot asked that if any errors were found in the Record, the Auditores should correct them. And now came the dramatic climax. I translate literally:

"And inasmuch as on inspection of the aforesaid Record and Process had before Thomas de Weylaunde¹⁹ and his fellows, it appears that a certain Inquisition held at the suit of the Abbot himself was returned into the Bench at Westminster before the Justices aforesaid by which it was found that the said Abbot, whom the monks of Roche asserted to be dead on the Tuesday next before Ascension Day in the 13th year of the present King at Beaulieu in the County of Southampton, was there alive three weeks after St. John the Baptist Day of the same year, crossing over Hamble Water²⁰ — and

also, inasmuch as the said Record was at the suit of the said Abbot brought before the King when John Paynel better proved the life of the said Abbot than the present Abbot the death of his predecessor, in that the said John (Paynel) proved by men in religion, Knights and servants worthy of belief and the Abbot by monks and his household whose evidence was not so good as that which the said John produced—whereby the Court of the King was sufficiently satisfied that the said Abbot predecessor of the present Abbot was alive at the time that seisin of the said tenements was given (to Paynel) by default of the said Abbot—and inasmuch as the said judgment which was rendered by the Justices of the Bench was afterwards confirmed by the Judges sitting for the King and by the whole Council of the King²¹ and inasmuch as the parties who are now in judgment are not the same as those when judgment passed, it is considered that the said William de Brompton) Philip (Paynel) and Robert (de Rowelle) go hence without a day and that the said Abbot take nothing by his plea but be in mercy for false plea. And let him sue by Writ if he thinks he can better himself.”²²

Ralph de Hengham, Chief Justice of the King's Bench,²³ was equally fortunate. William de Camville, a merchant of Bristol, complained of him that when he brought the Record and Process of a false judgment of the Mayor, Bailiffs and Commonalty of Dublin²⁴ under the seal of the Chief Justiciar of Ireland before de Hengham and also brought before him Adam Hundred and William de Beverley then Bailiffs of Dublin, to hear judgment concerning the said Record and Process, de Hengham refused to hear him, drove him from the Court and threatened him that if ever thereafter he produced this Record and Process before him he would have him imprisoned for a year and a day where he would see neither hand nor foot.

William further complained that when he offered himself against Adam Hundred and asked judgment on the Record and Process, de Hengham made him count (Narraret) *de novo* against the Attorney of Adam Hundred, so that he impeded William unjustly lest he could recover against the Dublin Court by reason of the false judgment and the said Court lose its franchise—he vouched the Rolls of Easter Term, 16 Edw.²⁵

A third complaint was that when judgment was given against Adam Hundred by de Hengham as for want of defence (*tanquam pro indefenso*), and William procured a Writ from de Hengham to the Chief Justiciar of Ireland to deliver to de Camville £40 and 1 mark then in the custody of the Chief Justiciar of Ireland and to

distrain Adam by lands and chattels to the value of £200 claimed by de Camville of him—"then came the said Ralph and wholly annihilated (adnichilauit) his judgment formerly before him rendered."

A fourth complaint was that after he had prosecuted his said action before de Hengham for two full years and even half a year after judgment obtained from de Hengham, the latter sent the Record and Process to the Court of Dublin for determination. A fifth complaint renewed this in different words.

De Hengham came and said that William did not have the original Writ of the King with Record and Process but some sort of a Writ under a seal he did not know and that he could not proceed without the original Writ—he vouched the Rolls and Writ to Warranty.

De Camville said that he produced the original Writ under the seal of the Chief Justiciar of Ireland and he also vouched Rolls and Writ—consequently the parties were at issue on the first complaint.

On the second there was a straight denial and vouching of Record by both parties.

As to the third and fourth, de Hengham said that the Writ issued by him was for distress only; and that he had a Writ of the King to send the Record of the plaint to Ireland. The Writ is copied *in extenso*: condensed, it sets out that on behalf of the Mayor and Citizens of Dublin it was shown that the King's predecessors had granted to them that if error or injustice were claimed by either party in pleas heard before them, the same might be corrected by "Our Chief Justiciar, or Council or our Justices of the Bench,"²⁶ that he Camville had averred error in an action in Dublin between him on the one side and William de Beverley and Adam Hundred on the other and had caused the said plea to be brought before de Hengham in England "contrary to the said concessions and liberties by Our progenitors granted and to the no small damage and detriment of the said citizens." The Judge was ordered no further to intromit in the said plea but to send it to Ireland.²⁷

"And inasmuch as it is found that the said Ralph had not an Original Writ whereby he could proceed and moreover it is found by the said Writ of the King that the said Ralph could not proceed in the said plea to the prejudice of the said citizens but that he must remit the said plea to Ireland: Therefore it is considered that Ralph go quiet (recedat quietus) from the plaint of the said William: And that William take nothing by his plaint but be in mercy for false claim. And he is pardoned inasmuch as he is poor."²⁸

Let us mention one who was not a Judge.

Roger of Lincoln, Constable of Devon, was accused by Thomas Silvester that on Monday next before St. Denis' Day, 16 Edw. I., he caught Silvester on St. Peter's Cemetery in Exeter and dragged him by the legs to gaol shackled by four fetters and afterwards threw him head first without a ladder into the bottom of the gaol a depth of not less than fifteen feet, manacled, on the neck—so that by the fall, he bled all night at the nose, "*os suum et fundamentum eius.*" He kept him in this dungeon from Tuesday till Friday after seven o'clock without meat or drink so that he was nine times in a faint and as though dead.

He also complained that Roger had seized some cattle of his. Roger pleaded that Silvester had previously been the King's Bailiff and had come of his own accord to render account of his receipts as such—that he was found in arrears £36, and that he was arrested and sent to the King's prison until he should pay his arrears. Afterwards certain friends of his came and became bail for the debt and he was released: and later he came and delivered the cattle in payment. Silvester stuck to his story.

The Commissioners directed the Coroners to summon twenty-four jurors to try the fact: the result is not given.

A whole tragedy appears in the plaint against William de Saham,²⁹ a Justice in Eyre in Huntingdonshire. The story as told is a long one but the salient features are as follows: Simon of Fenstanton (near St. Ives, Huntingdonshire) was said to be insane and incapable of disposing of his property—a writ was obtained directed to Richard de Holebroke, Royal Seneschal,³⁰ commanding him to commit the insane man with his lands and chattels to the care of some of his reliable relatives or friends who would be willing to treat him well and answer for his sustenance from the property. After a finding of insanity by an Inquisition by the Counties of Huntingdon and Cambridge, de Holebroke delivered the guardianship to Robert and the other sons of Simon. Simon however escaped from them and without their knowledge sold part of his property to Nicholas de Segrave, whereupon Robert obtained a Writ directed to the Earl of Cornwall ordering him if he found that de Holebroke had made Robert and his brothers Committee, to replace Simon in their custody and take any lands sold by Simon into the King's hands.

When de Holebroke returned to England he heard that de Segrave was trying to have a Fine between him and Simon of the land bought, levied before the Court; he appeared before the Justices, showed them the King's writ and opposed the Fine as did the Royal Attorney, Gilbert de Thorntone³¹; but nevertheless the Justices allowed

the Fine to be levied. De Segrave first appeared before the Commissioners bringing with him Godfrey Pickeforde and Thomas de Belhus formerly Sheriff of Cambridge—he said that the sons of Simon had been holding him in chains and depriving him of the management of his property although he was of sound and disposing mind, and that the King sent his Writ to Pickeforde directing him to go to the house of Simon with the Sheriff of Cambridge and other good and lawful men of the County and if they found him of sound mind and good memory they should cause him to have full control of himself and his property. Pickeforde stated that he received the Writ, and went along with the then Sheriff (“now present in Court and who asserted the same”) and other lawful men of the County to Simon’s house found him in irons in his chapel³² but of sound mind and good memory, and so he had the irons removed and took him into his Hall before the Sheriff and the other faith-worthy men before whom he answered all questions well and wisely and bade them to dinner and spoke on all other matters sanely. As it seemed to Pickeforde and the others that he was of sound mind they delivered to him free administration of his estate.

On the Commissioners examining the Records, it was found that neither the objection of Robert nor that of Gilbert de Thorntone, the King’s Attorney, had been entered or anything else than the *licentia concordandi* between Nicholas de Segrave and Simon. The Judge, William de Saham, then appeared and said that Robert did frequently object in the Eyre to the Fine being levied on the ground that his father Simon was *non compos mentis* and Gilbert de Thorn-tone for the King alleged the same—saying that Simon many times naked and girt with a sword visited the ladies of the country and did many other things such as those so afflicted do. The Judge said that on such representations the Justices in Eyre superseded the proceedings and refused to go further. Then Nicholas took Simon to the Exchequer at Westminster, where he was examined by Privy Councillors and found by them competent to levy a Fine—the Earl of Cornwall, the King’s representative, then directed the Court to proceed with the investigation.

The King put an end to the proceedings before the Commissioners by a Writ dated at Berwick-on-Tweed as de Segrave was employed in his service in Scotland—and “predicta querela remansit sine die.”³³

Toronto.

WILLIAM RENWICK RIDDELL.

¹ This “Le Mireur a Justices,” “Mirreur des Justices,” “Speculum Justiciarorum.” “Mirror of Justices,” long considered of authority was put in its true place by Frederic William Maitland in his edition published by the

Selden Society, London, 1895. The very learned editor calls it "an enigmatical treatise," devoured by Coke with "uncritical voracity" and considered by him "a very ancient and learned treatise of the laws and customs of the Kingdom" (Coke, 9 Rep., Preface), which has done much harm "to the sober study of English legal history"—speaking of the author, whoever he was, the editor truly says: "The right to lie he exercises unblushingly. A good instance is given us by the daring fable about the forty-four false judges whom King Alfred hanged in the space of a year . . . unless fortune has served him or us very ill, we must hold that he did not scruple to invent tales about times much later than those of Alfred."

Those interested are referred to two Papers by J. S. Leadam, *Transactions Royal Historical Society*, 1892, pp. 192-262, and 13 *Law Quarterly Review* (January, 1897), pp. 85-103; my article "King Alfred's Way with Judges," 16 *Illinois Law Review* (June, 1921), pp. 147-149, is of lighter calibre, but may be interesting to some.

² Maitland's *Mirror of Justices*, *ut suprâ*, Introduction, xxiv.: "the only or almost the only time in English history when a sweeping denunciation of the King's Justices as perjurers, murderers and thieves would have had enough truth in it to be plausible and popular . . . our one great judicial scandal . . . a unique event": Stubbs, *Constitutional History of England*, vol. ii., p. 125; Pauli, *Geschichte von England*, vol. iv., pp. 50, 51; Seeley, *Life & Reign of Edward I.*, pp. 75, 76; Lord Campbell, *Lives of the Chief Justices of England*, Murray, London, 1849, vol. 1, p. 75; Edward Thompson Co.'s new revised and very beautiful edition, Northport, L.I., 1894, vol. 1, p. 111; Lord Campbell, *Lives of the Lord Chancellors* . . . Lea, and Blanchard, Philadelphia, 1847, vol. 1, p. 147; Foss, of course, speaks of it under the name of each of the accused judges.

³ William de Brompton was found guilty on other charges, imprisoned and fined—he had been a Judge of the Common Pleas from 1274. Foss in his *Biographica Juridica* places the fine at 6,000 marks, i.e. £4,000: Tyrell in his *History* makes it 3,000 marks, £2,000—the Receipt Book shows the true amount paid to have been £3,666 13s. 4d., i.e., 5,500 marks. He seems to have been reinstated as Judge, but this is uncertain.

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⁶ Essoigns were an integral and important element in practice at the Common Law—the rules were intricate and in many cases uncertain. An essoign corresponds in substance to our adjournment or continuance.

⁷ "Statutum Marlebergie" (the genitive and dative singular, nominative and vocative plural of the First Declension was in most mediæval MSS. written with an "e" not our "æ") or "Statutum de Marlebergie" or "Statute of Marlborough, made at Marlborough, alias Marlberge, November 18, 1267, 52 Hen. III., by cap. 28 provides that "if any Wrongs or Trespasses be done to Abbots or other Prelates of the Church and they have sued their Right for such wrongs and be prevented with death before judgment therein, their Successors shall have actions . . . moreover the Successors shall have like actions for . . . things . . . withdrawn . . . from their House and Church before the Death of their Predecessor though their said Predecessor did not pursue their Right during their Lives: And if any intrude into the Lands . . . of such Religious Persons in the time of Vacation . . . the successors shall have a Writ to recover their Seison."

This is called the penultimate chapter as there are 29 chapters in the Statute, this being the 28th.

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When a tenant was duly summoned and failed to appear, unless he could essoin "*de malo lecti*," "*de malo veniendi*," "*de malo ventris*," "*de malo rille*," "*de ultra Mare*," or some other good excuse properly presented in Court, "*defaltam adjudicauerunt Justiciarii*"—the Justices adjudged default, and directed the lands claimed to be taken by the Sheriff "into the King's hand." *in manum Regis*; this they commanded by the writ *parum cape*. The seizure by the Sheriff was mesne, minor, *parum*, and not final. The tenant whose land was thus taken by the Sheriff, had the right to claim "*per plevinam*," and upon showing good cause might (not necessarily would) receive back the land until trial. Woe unto the litigant who rashly essoined double. In Hilary Term, 1 Joh., 1200, as assize was held to determine if "Eudo the uncle of William de Takele had been seized in his domain and of fee of the quarter of a military fee in Hertherst of which land Herevicius de Geddinges and his son Thomas were in possession." "*Ipsi essoniaverunt se de malo veniendi et postea de malo lecti: et capta fuit assisa per defectum*"—they essoined for difficulty in travel (i.e. bad roads, swollen fords, broken bridges, outlaw robbers, &c.) and then for sickness, and the assize was taken by default. Fortunately for them the Jury found against the plaintiff "*quod Eudo non fuit inde saisitus*," that Eudo was not then seized, and judgment went that Willemus nichil capiat per assisam illam." William should take nothing by that assize.

In the same Term, Reginald de Leham had been sued for forty shillings claimed by Petronella, widow of Humphrey Robertson—suing by her Attorney Walter Robertson as dower given by her husband "*ex dono viri sui*." "*Reginaldus . . . essoniavit se de malo veniendi et de malo lecti et non jacuit essonium*"—Reginald essoined himself *de malo veniendi et de malo lecti*: and he did not cast an essoin. See *Curia Regis Rolls . . . Richard I. and John*, King's Printer, London, 1922, pp. 135, 146.

¹¹ "Inquisitia" has a wide signification in Common Law proceedings—here it means an inquiry by the Grand Assize. See note 16, *post*.

¹² "In misericordia"—in mercy. When a complaint proved baseless or a defence failed the unsuccessful litigant was in *misericordia* and was liable to pay a fine to the King. The fine was not uncommonly half a mark, 6s. 8d., but sometimes much higher. I find one of 40s—worth about \$175 or \$200 at the present value of money. No small part of the Royal revenue came from these fines. We in Ontario still compel a litigant to pay at every step by stamp or in money.

¹³ A tremendous sum in those days equivalent to some \$50,000 to \$100,000 at the present value of money.

¹⁴ Of course a writ of Certiorari.

¹⁵ Ralph de Hengham was Capitalis Justiciarius, Chief Justice of the King's Bench, which Court had supervision over all the Common Law Courts of the Realm: he became C.J. in 1274 and continued as such till 1289 when he was succeeded by Gilbert de Thornton mentioned in the Text. We shall come across him again. The story runs that his whole offence was to alter a Record and make a poor man's fine 6s. 8d., instead of 13s. 4d.

As the Year Book, Michaelmas Term, 2 Richard III. (1484) 10 (A) pl. 22, has it—after speaking of the gravity of the offence of erasing a Record, the Report proceeds: "*p. talibus actibus Justic. pantea deinde fuer. p'sentat & convict. & unus fecit finem de octingentis is marc. videlicet Ingham: Justic alii &c. Et tantum fuit pro eo quod vdam paup fecerit finem p. quodm. debito ad. 13s. 4d. & idem Justic. fecerit rasari & pro pietat' fecit inde 6s. 8d.*"—for such acts Justices were long ago presented and convicted and one paid a fine of 800 marks, i.e., Ingham and other Justices &c. As to him the offence was that a certain poor man was to have paid a fine of 13s. 4d. for a certain debt and this Justice from sympathy caused it to be erased and to be inserted therein. 6s. 8d.

Coke, 4th Inst., f. 255, says that Ingham built the Clockhouse and supplied the Clock at Westminster Hall for his fine of 800 marks, (£533.6.8.) but Blackstone with unusual skepticism points out that "the first introduction of clocks was not till an hundred years afterwards about the end of the 14th Century." *Black. Comm.*, Bk. iii, p. 408, n(x): Original ed., Oxford, 1770. Blackstone was probably in error, for clocks had been in use from the 11th Century. This very clock with the motto "*disceite justitiam, moniti*" is said to have been gambled away by Henry VIII. *Ency. Brit.*, Vol. 6, pp. 536, 537. At all events, it was a tradition at Westminster Hall—Coke, 4th Inst., p. 255, tells us that in the reign of Queen Elizabeth, Chief Justice Sir Robert Catlin (C.J., Q.B., from 1559 to 1572) accused Mr. Justice John Southcote (Justice, Q.B., 1563-1577) with altering a Record—the Judge denied it in open Court and said "he meant not to build a clock house."

De Hengham paid £4303 6s. 8d. 6455 marks of his fine of 7000 marks—perhaps the balance, 545 marks, went for the clock and clock house.

He figured in nine cases and was acquitted in five—he was taken into favour again to and by 1300 he was a Judge once more—and the next year became Chief Justice of the Common Pleas—he retired in 1309 and died in 1311, being considered worthy of burial in St. Paul's. Campbell says: "He may be truly considered the father of Common Law Judges: he was the first of them who never put on a coat of mail— . . . contented with the ermined robe," *op. cit.*, p. 113.

¹⁶ I can find no rule against the number of "days" to be given in a year, &c: and the Commissioners treated the objection of the Abbot as baseless, passing it over *sub silentio*.

Before the time of Henry II, the only method of trial of right to possession or property in land was by Duel—that King by the assent of his nobles allowed the question to be tried by a "Grand Assize" of 12 Juratores and 4 Milites, on payment of a small fee to the Crown, generally 6s. 8d.

The duel or Battel was generally waged in the County Court but sometimes (and in later years always) at Westminster before the Judges of the Court of Common Pleas and the Serjeants-at-Law.

¹⁷ This fact makes it almost if not absolutely certain that the Abbott applied by *plevina* for the land seized into the hands of the King by the Sheriff; that an Inquisition was ordered and found against him. The complaint against the Judges was a *dernier ressort*.

¹⁸ John Paynel was the original claimant to whom seisin was given; but he must have placed Philip Paynel in possession or perhaps Philip succeeded to the inheritance—one Robert de Rowelle was also in possession of the land or some of it. Both Philip Paynel and de Rowelle were interested and had a right to be present in Court on Oyer of Record and Process. The modern form of the names is "Pennell" and "Rowell."

¹⁹ Thomas de Weylaunde (Weyland) had been Chief Justice of the Common Pleas since 1278 with Puisn's, Roger de Leicester, Walter de Helyun (or Elias de Beckingham), John de Lovetot and William de Brompton. When the King returned, de Weyland promptly fled, disguised himself as a monk and hid in a Monastery at Bury St. Edmunds. Discovered "wearing a cowl and a serge jerkin," he was starved into surrender; he obtained leave to abjure the Realm on forfeiting all his lands and chattels to the Crown—he was deported at Dover and died in exile leaving a name execrated like those of Jeffries and Scroggs for a time but now wholly forgotten.

²⁰ Hamble River rises near Bishops Waltham and after a short course forms a narrow estuary opening into Southampton Water on the east between Southampton and the English Channel.

²¹ The Privy Council (or Star Chamber) sitting at the Common Law before the Statute of 1487, 4 Henry VII, c. 1—See my Paper: "*The Judicial Committee of the Privy Council*," Missouri Bar Association, 1909.

²² This was a not uncommon entry when a litigant failed for any reason, corresponding to our "without prejudice to an action"—it might even be granted during the course of an unfinished action. As an example of the latter, in Hilary Term, 10 Richard I. (1199), in an Assize Mort d'Ancestor, Reginald de Lenna and John his brother being Claimants (patentees), the proceedings were held in abeyance because Richard the elder brother did not prosecute the case and was in misericordia; but "*Johannes querat breve si voluerit versus tenentes*"—let John seek a writ against the tenants if he likes.

In another case in Hilary Term, 1 John, (1200), William son of Osbert sued his brother Thomas by writ of Mort d'Ancestor: the action "*remanet quia ipsi sunt fratres*," but William was allowed to have a Writ of Right, Breve de Recto.

In Hilary Term, 2 John, 1201, the Abbot of this same House, Roche, sued by his attorney Reginald the Monk, the Prior of Holy Trinity at York and his House about the advowson of the Church at Roxby claiming that not the Prior but one Walter de Scotenin had the last presentation. Walter did not appear and the Prior went without a day: "*et Walterus perquirat se si voluerit*." One Ralph Painel figures in this action.

²³ As to Ralph de Hengham, see n. 15 *ante*.

²⁴ William de Camville (de Canuile or de Kanuile), a Bristol merchant, sued Adam Hundred and William de Beverley (de Beuerlaco) in the City Court of Dublin (Diucelina, Diuelina, Dublinia—all these names appear in this case) and failed. He procured the Chief Justiciar of Ireland to certify the proceedings and brought it before de Hengham in the King's Bench of England without an Original Writ of Certiorari, a clear irregularity even if

the English Court had had jurisdiction to supervise the Dublin Court. This irregularity alone was fatal to de Camville.

Moreover this was before Poyning's Law. 1294-5, 10 Henry VII, c. 22, and Ireland was not subject to English Statutes—Poyning's Law was repealed, (1782), 23 George III, c. 28.

In Blackstone's time, a writ of Error lay to the English from the Irish Court of King's Bench. *Comm. Bk. iii. p. 43* (original edition).

²⁰ 1289—Edward I came to the throne in 1274.

²¹ That is, in and for Ireland.

²² He had wrongly intermeddled with the action and the King's Writ dated at Cundac (i.e. Condat near Libourne, France), June 12, 1285, ordered him "remittere recordum illius loquele ad partes Hibernie," and he did so.

²³ Sometimes an unsuccessful litigant was let off his fine because he was under age.

²⁴ William de Saham became a Justice of the King's Bench in 1272 and remained such till this scandal broke out—he seems to have been a muddle-headed man, but was fined 3,000 marks of which he actually paid £1666.13.4, 2,500 marks. He was not reinstated but survived until 1300 at least.

²⁵ "Seneschal" was a somewhat generic title—here "Senescallus" means the Chief Royal officer, *locum tenens Regis*, in a particular district. The writ was a writ *de lunatico inquirendo*, issued by the King as *Parens patriæ*.

²⁶ Gilbert de Thornton was *Attornatus Regis*, acting along with W. de Giselham from 1279: he became Chief Justice of the King's Bench in 1289-90, succeeding Ralph de Hengham.

²⁷ "In capella sua in ferris, sane mentis et bone memorie existentem."

"Capella" in mediæval Latin was very ambiguous; Du Cange, *sub roc.*, gives eleven distinct and different meanings—it may be that the word here means nothing more than "house," *aedes ipsa*, the second definition given by Du Cange, vol. 2, p. 124.

²⁸ "And the said plaint stood over *sine die*." Very frequently the Kings even after Magna Carta directed a Writ to the Justices not to proceed in the case of person absent on the Royal, i.e. national, business. The writ said of de Segrave: "qui per preceptum nostrum in partibus Scotie in obsequio nostro moram facit"—and directed a stay "donec aliud inde precepimus"—until Our further order herein.

GENERAL NOTE.

It may be worth while to state the names of the Investigators, Commissioners, Auditores, and the result of this investigation.

Commissioners.

The original Commissioners were:—

1. Robert Burnell, Bishop of Bath and Wells, Lord Chancellor, 1273-1292.
2. Henry Lacy, Earl of Lincoln.
3. John de Portoise, Bishop of Winchester.
4. John de St. John.
5. William le Latimer.
6. William de March, afterwards (1293), Bishop of Bath and Wells.
7. William de Louth, afterwards, (1290), Bishop of Ely.

These seem to have continued in office.

There were added:

8. Peter de Leicester, (1292), Justice of the Jews.
9. Thomas de Searning, (1290), Archdeacon of Norwich.

There were also special Auditores for London.

Those investigated included 16 Judges, over 40 Sheriffs and Undersheriffs, many Coroners and Escheators and between 300 and 400 Bailiffs and Sub-bailiffs.

Judges:

1. Thomas de Wayland, C.J., C.P., abjured Realm, giving up all his property.

2. Ralph de Hengham, C.J., K.B., fined 7000 marks: paid £4303.6.8, i.e., 6445 marks.

3. Adam de Stretton of Court of Exchequer paid 500 marks: he is said to have been fined 32000 marks: he was a clerk and not really a Judge.

4. William de Brompton, J., C.P., fined 6000 marks, paid £3666.13.4, i.e., 5500 marks.

5. Solomon de Rochester, Justice in Eyre, fined 4000 marks, paid £2100, i.e., 3150 marks.

6. William de Saham, J., K.B., fined 3000 marks: paid £1666.13.4, i.e., 2500 marks.

7. Richard de Boyland, Justice in Eyre, fined 4000 marks: paid £473.6.8, i.e., 726 marks.

8. Thomas de Sodington, do, do, 4,000 marks: paid £1126.13.4, i.e., 1690 marks.

9. John de Lovetot, J., K.B., fined 3000 marks: paid £1333.6.8, i.e., 2000 marks.

(Nos. 2, 3, 4 and 9 were pardoned.)

10. Henry de Bray, Justice of the Jews and Escheator, fined 1000 marks (and tried to commit suicide in the Tower): he paid £304.6.8, i.e., 456 marks.

11. Robert de Littlebury (or Lithbury), Master (Clerk) of the Rolls, hardly as yet a judicial position—fined 1000 marks: paid £364, i.e., 546 marks, afterwards pardoned.

12. Roger de Leicester, M.R., or from K.B. (Foss makes him J., C. P., 1275-1289) fined 1000 marks, paid £253.6.8, i.e., 380 marks.

John de Mattingham (Mettingham) J., K.B., and Elias de Beckingham, J., C.P. (1284-1305) were honorably acquitted.

W. R. R.

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ERRING JUDGES OF THE THIRTEENTH CENTURY

BY WILLIAM RENWICK RIDDELL*

THE Royal Historical Society (of London) has published much material of great interest to lawyers—an humble Fellow, I think none is more interesting than that published in 1906: "State Trials of the Reign of Edward the First, 1289-1293".

The subject is the investigation into the alleged cruelty, injustice and venality of the Royal Officers, great and small, in England, during the absence of the King in Gascony, 1286-1289—among them some of the Judges. It is well known to students of legal history that several Judges were accused and some convicted and severely fined—some losing their Commissions as well.

It is, however, gratifying to know that examination of the extant official records enables the learned editors to say that very many charges were found to be without real basis in fact—nevertheless there was a drastic and dramatic weeding out of the Judicial Bench which made a great impression; and since that time, while there has been in England a sporadic case from time to time until comparatively recent years, of judicial corruption—as witness the deplorable case of Bacon—there has been no complaint of wholesale impropriety.

The earlier instance of drastic and extensive punishment of Judges by King Alfred we now know to be entirely mythical depending as it does wholly for authority on the lying "Le Mireur a Jus-

*Justice of the Supreme Court of Ontario (Appellate Division).

tices".¹ The transactions in King Edward's time, however, are authenticated by extant records, and are mentioned by reliable historians.²

It is not the purpose of this paper to discuss the matter at large; but only to give some account of certain of the proceedings before the Commissioners or Auditores. I shall not transcribe the original Latin but translate as literally as the idioms of the two languages permit, abbreviating in unimportant matters.

All the Justices of the Bench and especially William de Brompton³ were accused by the Abbot of Roche (a Cistercian Abbey near

¹This "Le Mireur a Justices", "Mirreur des Justices", "Speculum Justiciarorum", "Mirror of Justices", long considered of authority, was put in its true place by Sir Frederic William Maitland in the edition published by the Selden Society, London, 1895. The very learned writer calls it "an enigmatical treatise", devoured by Coke with "uncritical voracity" and considered by him "a very ancient and learned treatise of the laws and customs of the Kingdom" (Coke 9 Rep. Preface), which has done much harm "to the sober study of English legal history"—speaking of the author whoever he was, the editor truly says: "The right to lie he exercises unblushingly. A good instance is given us by the daring fable about the forty-four false judges whom King Alfred hanged in the space of a year * * * unless fortune has served him or us very ill, we must hold that he did not scruple to invent tales about times much later than those of Alfred".

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Rotherham in Yorkshire) and the investigation took a wide course.

The complaint was that one John Paynel by the maintenance of John of Kirkby then Bishop of Ely whose niece⁴ Paynel had married, had a writ of *precipe in capite*⁵ against William the preceding Abbot of Roche concerning certain land in Roxby in Lincolnshire, and that the writ was returned into Court on the Octave of St. John the Baptist. On this day the Abbot aforesaid was essoigned⁶ and had "a day" 15 days after Michaelmas—"15 days" meant a fortnight at the Common Law) on which day he craved a view of the land and had a day 15 days after St. Martin's on which day the Abbot was essoigned and had a day 15 days after St. Hilary's on which day the parties pleaded—so that within the half year four days were given to the said Abbot—against the law and custom of the Realm, according to which in one year only three or in two years only five days could be given in a Writ of Right—to the damage of the said Abbot, &c. This was the first ground of complaint—a status being claimed by the complaining Abbot under the penultimate Chapter of the Statute of Marlborough.⁷

paid to have been £3666.13s4d, i.e., 5500 marks. He seems to have been re-instated as Judge, but this is uncertain.

⁴The word "neptem", "neptis", in Classical Latin was generally "grand-daughter"; e.g., Ovid in his *Metamorphoses*, 4,530 speaks of Ino as "neptis Veneris". But like the corresponding "nepos", "grandson", it became even in Classical but post Augustan times in use for the child of a brother or sister. The "nephews" and "nieces" of ecclesiastics were not infrequently suspected of closer relationship to the cleric.

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The second ground of complaint was more serious:

When the Justices had on the day last named given Abbot Walter a day the morrow of Ascension Day, Walter died shortly before the return day at Beaulieu (a Cistercian Abbey in the New Forest)—and on the day, monks of Roche came before the Justices and informed them that he was dead “which was testified by true and lawful men and the letters of the Abbots of Beaulieu and of Netley (a Cistercian Abbey on Southampton Water) that they had buried him on Tuesday; but the said Justices did not admit or enrol this evidence⁸ against the Statute of Westminster II⁹ but by error and favor adjudged default¹⁰ against the said Abbot after his death. And they

cessors shall have actions * * * moreover the Successors shall have like actions for * * * things * * * withdrawn * * * from their House and Church before the Death of their Predecessor though their said Predecessor did not pursue their Right during their Lives: And if any intrude into the Lands * * * of such Religious Persons in the time of Vacation * * * the successors shall have a Writ to recover their Seison”.

This is called the penultimate chapter as there are 29 chapters in the Statute this being the 28th.

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When a tenant was duly summoned and failed to appear unless he could essoign “*de malo lecti*”, “*de malo Veniendi*”, “*de malo ventris*”, “*de malo ville*”, “*de ultra Mare*” or some other good excuse properly presented in Court, “*defaltam adiudicauerunt Justiciarii*”—the Justices adjudged default, and directed the lands claimed to be taken by the Sheriff “into the King’s hand”, *in manum Regis*; this they commanded by the Writ *parvum cape*. The seizure by the Sheriff was mesne, minor, *parvum*, and not final. The tenant whose land was thus taken by the Sheriff, had the right to claim “*per plevinam*”, and upon showing good cause might (not necessarily would) receive back the land until trial. Woe unto the litigant who rashly essoigned double. In Hilary Term, 1 Joh., 1200, as Assize was held to determine if “Eudo the uncle of William de Takele had been seized in his domain and of fee of the quarter of a military fee in Hertherst of which land Herevicius de Geddinges and his son Thomas were in possession”. “*Ipsi essoniaverunt se de malo veniendi et postea de malo lecti: et capta fuit assisa per defectum*”—they essoigned for difficulty in travel (i.e. bad roads, swollen fords, broken bridges, outlaw robbers, &c.) and then for sickness and the Assize was taken by default. Fortunately for them the Jury found against the plaintiff “*quod Eudo non fuit inde saisitus*”, that Eudo was not then seized and judgment went that “*Willemus nichil capiat per assisam illam*”, William should take nothing by that Assize.

directed the issue of a writ called *parvum cape* to seize the land into the King's hand and to summon the Abbot to be before them on the Octave of St. John the Baptist to hear judgment on his default made after appearance. On this day monks of Roche came with monks of Beaulieu before the Justices and said that no default could be made because the Abbot was dead which they were ready to prove—notwithstanding this, the Justices adjudged seisin of the land to Paynel, no inquisition being had¹¹ and the said Abbot in mercy.¹²

Damages were claimed for the existing Abbot and his House of £1000.¹³

William de Brompton, brought before the Commissioners, pleaded that the plea between the (former) abbot and Paynel was before him and his fellows of the Bench and judgment was rendered therein according to the law and custom of the realm—and afterwards on Royal Writ¹⁴ they sent the Record and Process before Ralph de Hingham and his fellows holding Pleas of the Crown¹⁵ “and he says that the

In the same Term, Reginald de Leham had been sued for forty shillings claimed by Petronella widow of Humphrey Robertson—suing by her Attorney Walter Robertson—as dower given by her husband, “ex dono viri sui”, “Reginaldus * * * essoniavit se de malo veniendi et de malo lecti et non jacuit essonium”—Reginald essoigned himself *de malo veniendi et de malo lecti*: and he did not cast an essoign. See CURIA REGIS ROLLS * * * RICHARD I AND JOHN, King's Printer, London, 1922, pp. 135, 146.

¹¹“Inquisitio” has a wide signification in Common Law proceedings—here it means an inquiry by the Grand Assize. See note 16 *post*.

¹²“In misericordia”—in mercy. When a complaint proved baseless or a defence failed the unsuccessful litigant was *in misericordia* and was liable to pay a fine to the King. The fine was not uncommonly half a mark, 6s. 8d, but sometimes much higher. I find one of 40s—worth about \$175 or \$200 at the present value of money. No small part of the Royal revenue came from these fines. We in Ontario still compel a litigant to pay at every step by stamp or in money.

¹³A tremendous sum in those days equivalent to some \$80,000 to \$100,000 at the present value of money.

¹⁴Of course a Writ of Certiorari.

¹⁵Ralph de Hingham was Capitalis Justiciarius, Chief Justice of the King's Bench, which Court had supervision over all the Common Law Courts of the Realm: he became C. J. in 1274 and continued as such till 1289 when he was succeeded by Gilbert de Thornton mentioned in the Text. We shall come across him again. The story runs that his whole offence was to alter a Record and make a poor man's fine 6s. 8d, instead of 13s. 4d. YEAR BOOK, MICHAELMAS TERM, 2 Richard III (1484) 10 (A) pl. 22, has it. After speaking of the gravity of the offence of erasing a Record, the Re-

said judgment was there affirmed as good according to the law and custom of England—whence it appears that he ought not to be called upon to answer without the said Ralph and his fellows who affirmed the said judgment as good. And he said that if the Auditores so directed he would answer without them”. His dilatory plea was ineffective: he was asked about the essoigns—four days in half a year—and he said that heretofore the Justices of the Bench were accustomed of their own volition to give to the parties more than three days in a year “according to the nearness of the County (Court) before duel waged or the sending of the Grand Assize”.¹⁶

port proceeds: “p talibus actibus Justic. pantea deinde fuer. psentat & convict’, & unus fecit finem de octingentis marc’, videlicet Ingham; Justic alii &c. Et tantum fuit pro eo quod qdam paup. fecerit finem p quodm debito ad 13s. 4d. & idem Justic fecerit rasari & pro pietat’ fecit inde 6s. 8d.”—for such acts Justices were long ago presented and convicted and one paid a fine of 800 marks, i.e. Ingham and other Justices, &c. As to him the offence was that a certain poor man was to have paid a fine of 13s. 4d. for a certain debt and this Justice from sympathy caused it to be erased and to be inserted therein, 6s. 8d.

COKE, 4TH INST., f. 255 says that he built the Clockhouse and supplied the Clock at Westminster Hall for his fine of 800 marks, (£533.6.8), but Blackstone with unusual skepticism points out that “the first introduction of clocks was not till an hundred years afterwards about the end of the 14th Century”. BLACK. COMM., Bk. iii, p. 408, n (x): Original ed., Oxford, 1770. Blackstone was probably in error, for clocks had been in use from the 11th Century. This very clock with the motto “Discite justitiam, moniti” is said to have been gambled away by Henry VIII, ENCY. BRIT., Vol. 6, pp. 536, 537. At all events, it was a tradition at Westminster Hall. 4 COKE, 4TH INST., p. 255, tells us that in the reign of Queen Elizabeth, Chief Justice Sir Robert Catlin (C. J., Q. B., from 1559 to 1572) accused Mr. Justice John Southcote (Justice, Q. B., 1563-1577) with altering a Record—the Judge denied it in open Court and said “he meant not to build a clock house”.

De Hengham paid £4303 6s. 8d, 6455 marks of his fine of 7000 marks—perhaps the balance 545 marks went for the clock and clock house.

He figured in nine cases and was acquitted in five—he was taken into favour again to and by 1300 he was a Judge once more—and the next year became Chief Justice of Common Pleas—he retired in 1309 and died in 1311, being considered worthy of burial in St. Paul’s. Campbell says: “He may be truly considered the father of Common Law Judges: he was the first of them who never put on a coat of mail * * * contented with the ermined robe” *Op. cit.*, p. 113.

¹⁶I can find no rule against the number of “days” to be given in a year, &c.: and the Commissioners treated the objection of the Abbot as baseless, passing it over *sub silentio*.

Before the time of Henry II, the only method of trial of right to possession or property in land was by Duel—that King by the assent of his nobles allowed

As to the evidence of the death of Abbot Walter, predecessor of the present Abbot, he said that he did nothing against the law and custom of the realm—for, he said, testimony of this kind by letters of Bishops or Abbott is not admissible as authentic (*tanquam autentica*) in the King's Courts except in special cases, that is to say, when the Bishop writes to the Justices of the Bench that a certain person is excommunicated for contumacy or absolved if previously excommunicated and the like.

And moreover, he says that an Inquisition was had on precept of the King concerning the death of Abbot Walter by which Inquisition it was found that he was alive on the day of judgment rendered.¹⁷

The Abbot complainant admitted that it might be that the judgment had been afterwards affirmed by Ralph de Hengham in the King's Bench—but claimed nevertheless that it was not good but that Ralph had increased not corrected the wrong done thereby to the Abbot.

William de Brompton then said that if there was any error in the process, it should be corrected by the Auditores—they sent for Record and Process and issued a Precept to the Sheriff of Lincolnshire to have Philip Paynel,¹⁸ tenant of the land present before them, 15 days after St. Hilary's day to hear the Record, &c.—it was accordingly read. Afterwards on the Octave of St. John the Baptist came before the Auditores, the Abbot and also Philip Paynel and Robert de Rowelle the tenants of the land. The Abbot asked that if any errors

the question to be tried by a "Grand Assize" of 12 Juratores and 4 Milites, on payment of a small fee to the crown, generally 6s. 8d.

The duel or Battel was generally waged in the County Court but sometimes (and in later years always) at Westminster before the Judges of the Court of Common Pleas and the Serjeants-at-Law.

¹⁷This fact makes it almost if not absolutely certain that the Abbott applied by *plevina* for the land seized into the hands of the King by the Sheriff; that an Inquisition was ordered and found against him. The complaint against the Judges was a *dernier ressort*.

¹⁸John Paynel was the original claimant to whom seisin was given; but he must have placed Philip Paynel in possession or perhaps Philip succeeded to the inheritance—one Robert de Rowelle was also in possession of the land or some of it. Both Philip Paynel and de Rowelle were interested and had a right to be present in Court on Oyer of Record and Process. The modern form of the names is "Pennell" and "Rowell".

were found in the Record, the Auditores should correct them. And now came the dramatic climax. I translate literally:

"And inasmuch as on inspection of the aforesaid Record and Process had before Thomas de Weylaunde¹⁹ and his fellows, it appears that a certain Inquisition held at the suit of the Abbot himself was returned into the Bench at Westminster before the Justices aforesaid by which it was found that the said Abbot, whom the monks of Roche asserted to be dead on the Tuesday next before Ascension Day in the 13th year of the present King at Beaulieu in the County of Southampton was there alive three weeks after St. John the Baptist's Day of the same year crossing over Hamble Water²⁰—and also, inasmuch as the said Record was at the suit of the said Abbot brought before the King when John Paynel better proved the life of the said Abbot than the present Abbot proved the death of his predecessor, in that the said John (Paynel) proved by men in religion, Knights and by servants worthy of belief and the Abbot by monks and his household whose evidence was not so good, as that the said John produced—whereby the Court of the King was sufficiently satisfied that the said Abbot, predecessor of the present Abbot, was alive at the time that seisin of the said tenements was given—to Paynel) by default of the said Abbot—and inasmuch as the said judgment which was rendered by the Justices of the Bench was afterwards confirmed by the Judges sitting for the King and by the whole Council of the King²¹ and inasmuch as the parties who are now in judgment are not the same as those when judgment passed, it is considered that the said William (de Brompton

¹⁹Thomas de Weylaunde (Weyland) had been Chief Justice of the Common Pleas since 1278 with Puisnés, Roger de Leicester, Walter de Helyun (or Elias de Beckingham), John de Lovetot and William de Brompton. When the King returned, de Weyland promptly fled, disguised himself as a monk and hid in a Monastery at Bury St. Edmunds. Discovered "wearing a cowl and a serge jerkin", he was starved into surrender; he obtained leave to abjure the Realm on forfeiting all his lands and chattels to the Crown—he was deported at Dover and died in exile leaving a name execrated like those of Jeffries and Scroggs.

²⁰Hamble River rises near Bishops Waltham and after a short course forms a narrow estuary opening into Southampton Water on the east between Southampton and the English Channel.

²¹The Privy Council (or Star Chamber) sitting at the Common Law before the Statute of 1487, 4 Henry VII, c. 1—See my paper: "The Judicial Committee of the Privy Council", MISSOURI BAR ASSOCIATION, 1909.

ton) Philip (Peynal) and Robert (de Rowelle) go hence without a day and that the said Abbot take nothing by his plea but be in mercy for false plea. And let him sue by Writ if he thinks he can better himself."²²

Ralph de Hingham, Chief Justice of the King's Bench,²³ was equally fortunate. William de Camville a merchant of Bristol complained of him that when he brought the Record and Process of a false judgment of the Mayor, Bailiffs and Commonalty of Dublin²⁴ under the seal of the Chief Justiciar of Ireland before de Hingham and also brought before him Adam Hundred and William de Beverley then Bailiffs of Dublin to hear judgment concerning the said Record and Process, de Hingham refused to hear him, drove him

²²This was a not uncommon entry when a litigant failed for any reason, corresponding to our "without prejudice to an action"—it might even be granted during the course of an unfinished action. As an example of the latter, in Hilary Term, 10 Richard I, (1199), in an Assize of Mort d'Ancestor, Reginald de Lenna and John his brother being Claimants (petentes), the proceedings were held in abeyance because Richard the elder brother did not prosecute the case and was in misericordia; but "*Johannes querat breve si voluerit versus tenentes*"—let John seek a writ against the tenants if he likes.

In another case in Hilary Term, 1 John, (1200), William son of Osbert sued his brother Thomas by writ of Mort d'Ancestor: the action "*remanet quia ipsi sunt fratres*"; but William was allowed to have a Writ of Right, Breve de Recto.

In Hilary Term, 2 John, 1201, the Abbot of this same House, Roche, sued by his attorney Reginald the Monk, the Prior of Holy Trinity at York and his House about the advowson of the Church at Roxby claiming that not the Prior but one Walter de Scotenin had the last presentation. Walter did not appear and the Prior went without a day: "*et Walterus perquirat se si voluerit*". One Ralph Paine figures in this action.

²³As to Ralph de Hingham, see n. 15 *ante*.

²⁴William de Camville (de Canuile or de Kanuile), a Bristol merchant, sued Adam Hundred and William de Beverley (de Beuerlace) in the City Court of Dublin (Diuelyna, Diuelina, Dublinia—all these names appear in this case) and failed. He procured the Chief Justiciar of Ireland to certify the proceedings and brought it before de Hingham in the King's Bench of England without an Original Writ of Certiorari, a clear irregularity even if the English Court had had jurisdiction to supervise the Dublin Court. This irregularity alone was fatal to de Camville.

Moreover, this was before Poyning's Law, 1294-5, 10 Henry VII, c. 22, and Ireland was not subject to English Statutes—Poyning's Law was repealed, (1782), 23 George III, c. 28.

In Blackstone's time, a writ of Error lay to the English from the Irish Court of King's Bench, COMM. Bk. iii, p. 43 (original edition).

from the Court and threatened him that if ever thereafter he produced this Record and Process before him he would have him imprisoned for a year and a day where he would see neither hand nor foot.

William further complained that when he offered himself against Adam Hundred and asked judgment on the Record and Process, de Hengham made him count (narraret) *de novo* against the Attorney of Adam Hundred, so that he impeded William unjustly lest he should recover against the Dublin Court by reason of the false judgment and the said Court lose its franchise—he vouched the Rolls of Easter Term, 16 Edw.²⁵

A third complaint was that when judgment was given against Adam Hundred by de Hengham as for want of defence (*tanquam pro indefenso*), and he procured a Writ from de Hengham to the Chief Justiciar of Ireland to deliver to de Camville £40 and 1 mark then in the custody of the Chief Justiciar of Ireland and to distrain Adam by lands and chattels to the value of £200 claimed by de Camville of him—"then came the said Ralph and wholly annihilated (*adnichilavit*) his judgment formerly before him rendered".

A fourth complaint was that after he had prosecuted his said action before de Hengham for two full years and even half a year after judgment obtained from de Hengham, the latter sent the Record and Process to the Court of Dublin for determination. A fifth complaint renewed this in different words.

De Hengham came and said that he did not have the original Writ of the King with Record and Process but some sort of a Writ under a seal he did not know and that he could not proceed without the original Writ—he vouched the Rolls and Writ to Warranty.

De Camville said that he produced the original Writ under the seal of the Chief Justiciar of Ireland and he also vouched Rolls and Writ—consequently the parties were at issue on the first complaint.

On the second there was a straight denial and vouching of Record by both parties.

As to the third and fourth, de Hengham said that the Writ issued by him was for distress only, and that he had a Writ of the King

²⁵1289—Edward I came to the throne in 1274.

to send the Record of the plaint to Ireland. The Writ is copied *in extenso*: condensed, it sets out that on behalf of the Mayor and Citizens of Dublin it was shown that the King's predecessors had granted to them that if error or injustice were claimed by either party in pleas heard before them, the same might be corrected by "Our Chief Justiciar, or Council or our Justices of the Bench",²⁶ that de Camville had asserted error in an action in Dublin between him on the one side and William de Beverley and Adam Hundred on the other and had caused the said plea to be brought before de Hengham in England "contrary to the said concessions and liberties by Our progenitors granted and to the no small damage and detriment of the said citizens". He was ordered no further to intromit in the said plea but to send it to Ireland.²⁷

"And inasmuch as it is found that the said Ralph had not an Original Writ whereby he could proceed and moreover it is found by the said Writ of the King that the said Ralph could not proceed in the said plea to the prejudice of the said citizens but that he must remit the said plea to Ireland: Therefore it is considered that Ralph go quiet (*recedat quietus*) from the plaint of the said William: And that William take nothing by his plaint but be in mercy for false claim. And he is pardoned inasmuch as he is poor".²⁸

Let us mention one who was not a Judge.

Roger of Lincoln, Constable of Devon, was accused by Thomas Silvester that on Monday next before St. Denis' Day, 16 Edw. I, he caught Silvester in St. Peter's Cemetery in Exeter and dragged him by the legs to goal and shackled by four fetters and afterwards thrown head first without a ladder into the bottom of the goal a depth of not less than fifteen feet, manacled on the neck—so that by the fall, he bled all night at the nose, "*os suum et fundamentum eius*". He kept him in this dungeon from Tuesday till Friday after seven o'clock without meat or drink so that he was nine times in a faint and as though dead.

²⁶That is, in and for Ireland.

²⁷He had wrongly intermeddled with the action and the King's Writ dated at Cundac (i.e. Condat near Libourne, France), June 12, 1285, ordered him "*remittere recordum illius loquele ad partes Hibernie*", and he did so.

²⁸Sometimes an unsuccessful litigant was let off his fine because he was under age.

He also complained that Roger had seized some cattle of his.

Roger pleaded that Silvester had previously been the King's Bailiff and had come of his own accord to render account of his receipts as such—that he was found in arrears £36, and that he was arrested and sent to the King's prison until he should pay his arrears. Afterwards certain friends of his came and became bail for the debt and he was released: and later he came and delivered the cattle in payment. Silvester stuck to his story.

The Commissioners directed the Coroners to summon twenty-four jurors to try the fact: the result is not given.

A whole tragedy appears in the plaint against William de Saham,²⁹ a Justice in Eyre in Huntingdonshire. The story as told is a long one but the salient features are as follows: Simon of Fenstanton (near St. Ives, Huntingdonshire) was said to be insane and incapable of disposing of his property—a writ was obtained directed to Richard de Holebroke, Royal Seneschal,³⁰ commanding him to commit the insane man with his lands and chattels to the care of some of his reliable relatives or friends who would be willing to treat him well and answer for his sustenance from the property. After a finding of insanity by an Inquisition by the Counties of Huntingdon and Cambridge, de Holebroke delivered the guardianship to Robert and the other sons of Simon. Simon however escaped from them and without their knowledge sold part of his property to Nicholas de Segrave whereupon Robert obtained a Writ directed to the Earl of Cornwall ordering him if he found that de Holebroke had made Robert and his brothers Committee, to replace Simon in their custody and take any lands sold by Simon into the King's hands.

When de Holebroke returned to England he heard that de Segrave was trying to have a Fine between him and Simon of the land bought levied before the Court: he appeared before the Justices, showed them the King's writ and opposed the Fine as did the Royal Attorney, Gil-

²⁹William de Saham became a Justice of the King's Bench in 1272 and remained such till this scandal broke out—he seems to have been a muddle-headed man but was fined 3000 marks of which he actually paid £1666.13.4, 2500 marks. He was not reinstated but survived until 1300 at least.

³⁰"Seneschal" was a somewhat generic title—here "Senescallus" means the Chief Royal officer, *locum tenens Regis*, in a particular district. The writ was a writ *de lunatico inquirendo*, issued by the King as Parens patriae.

bert de Thorntone,³¹ but nevertheless the Justices allowed the Fine to be levied. De Segrave first appeared before the Commissioners bringing with him Godfrey Pickeforde and Thomas de Belhus, formerly Sheriff of Cambridge—he said that the sons of Simon had been holding him in chains and depriving him of the management of his property although he was of sound and disposing mind, and that the King sent his Writ to Pickeforde directing him to go to the house of Simon with the Sheriff of Cambridge and other good and lawful men of the Country and if they found him of sound mind and good memory, they should cause him to have full control of himself and his property. Pickeforde stated that he received the Writ, and went along with the then Sheriff (“now present in Court and who asserted the same”) and other lawful men of the Country to Simon’s house, found him in irons in his chapel³² but of sound mind and good memory, and so he had the irons removed and took him into his Hall before the Sheriff and the other faith-worthy men before whom he answered all questions well and wisely and bade them to dinner and spoke on all other matters sanely. As it seemed to Pickeforde and the others that he was of sound mind they delivered to him free administration of his estate.

On the Commissioners examining the Records, it was found that neither the objection of Robert nor that of Gilbert de Thorntone, the King’s Attorney, had been entered or anything else than the *licentia concordandi* between Nicholas de Segrave and Simon. The Judge, William de Saham, then appeared and said that Robert did frequently object in the Eyre to the Fine being levied on the ground that his father Simon was *non compos mentis* and Gilbert de Thorntone for the King alleged the same—saying that Simon many times, naked and girt with a sword, visited the ladies of the country and did many other things such as those so afflicted do. The Judge said that on

³¹Gilbert de Thornton was Attornatus Regis, acting along with M. de Giselham from 1279: he became Chief Justice of the King’s Bench in 1289-90, succeeding Ralph de Hengham.

³²“In capella sua in ferris, sane mentis et bone memorie existentem.” “Capella” in mediaeval Latin was very ambiguous, Du Cange, *sub voc.*, gives eleven distinct and different meanings—it may be that the word here means nothing more than “house”, *aedes ipsa*, the second definition given by Du Cange, vol. 2, p. 124.

such representations the Justices in Eyre superseded the proceedings and refused to go further. Then Nicholas took Simon to the Exchequer at Westminster where he was examined by Privy Councillors and found by them competent to levy a Fine—the Earl of Cornwall the King's representative then directed the Court to proceed with the investigation.

The King put an end to the proceedings before the Commissioners by a Writ dated at Berwick on Tweed as de Segrave was employed in his service in Scotland—and “predicta querela remansit sine die”.³³

³³“And the said plaint stood over *sine die*.” Very frequently the Kings even after Magna Carta directed a Writ to the Justices not to proceed in the case of person absent on the Royal i.e. national, business. The writ said of de Segrave: “qui per preceptum nostrum in partibus Scotie in obsequie nostro moram facit”—and directed a stay “donec aliud inde precepimus”—until our further order herein.

It may be worth while to state the names of the Investigators, Commissioners, Auditores, and the result of this investigation.

Commissioners

The original Commissioners were:

1. Robert Burnell, Bishop of Bath and Wells, Lord Chancellor, 1273-1292.
2. Henry Lacy, Earl of Lincoln.
3. John de Portoise, Bishop of Winchester.
4. John de St. John.
5. William le Latimer.
6. William de March afterwards, (1293), Bishop of Bath and Wells.
7. William de Louth afterwards, (1290), Bishop of Ely.

These seem to have continued in office.

There were added:

8. Peter de Leicester, (1292), Justice of the Jews.
9. Thomas de Searning, (1290), Archdeacon of Norwich.

There were also special Auditores for London.

Those investigated included 16 Judges, over 40 Sheriffs and Undersheriffs, many Coroners and Escheators and between 300 and 400 Bailiffs and Sub-bailiffs.

Judges:

1. Thomas de Wayland, C. J., C. P., adjured Realm, giving up all his property.
2. Ralph de Hengham, C. J., K. B., fined 7000 marks: paid £4303.6.8., i.e., 6445 marks.
3. Adam de Stretton of Court of Exchequer paid 500 marks; he is said to have been fined 32000 marks; he was a Clerk and not really a Judge.
4. William de Brompton, J., C. P., fined 6000 marks, paid £3666.13.4, i.e. 5500 marks.

5. Solomon de Rochester, Justice in Eyre, fined 4000 marks, paid £2100, i.e., 3150 marks.
6. William de Saham, J., K. B., fined 3000 marks: paid £1666.13.4, i.e., 2500 marks.
7. Richard de Boyland, Justice in Eyre, fined 4000 marks: paid £473.6.8, i.e., 726 marks.
8. Thomas de Sodington, do, do, 4000 marks: paid £1126.13.4, i.e., 1690 marks.
9. John de Lovetot, J., K. B., fined 3000 marks: paid £1333.6.8, i.e., 2000 marks.

(Nos. 2, 3, 4, and 9 were pardoned)

10. Henry de Bray, Justice of the Jews and Escheator, fined 1000 marks (and tried to commit suicide in the Tower); he paid £304.6.8, i.e., 456 marks.
11. Robert de Littlebury (or Lithbury), Master (Clerk) of the Rolls, hardly yet a judicial position—fined 1000 marks: paid £364, i.e., 546 marks, afterwards pardoned.
12. Roger de Leicester, M. R., or from K. B. (Foss makes him J., C. P., 1275-1289) fined 1000 marks, paid £253.6.8, i.e., 380 marks.
13. John de Mattingham (Mettingham), J., K. B., and Elias de Beckingham, J., C. P. (1284-1305) were honorably acquitted.



ILLINOIS LAW REVIEW

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DIVERSITIES

WETTING THE BARGAIN.—In my boyhood in Upper Canada, and more especially in the rural districts, a custom prevailed of "wetting the bargain." Of course, some act, more or less formal, "by which conclusive assent is manifested to the terms of a bargain, has been common to all countries and in all ages."¹ This was in the absence of a writing; and until this act was done, the bargain was not considered finally closed. The Jew plucked off his shoe and handed it to his neighbor; the Indian smoked a pipe; the followers of the Roman or civil law gave *arrha* or earnest, as *emptionis venditionis contractae argumentum*.² At the English common law earnest was sometimes given, as will appear from section 17 of the Statute of Frauds—or a God's penny, *argentum Dei*—to bind the bargain.³

1. Story on "Sales" (4th ed. 1871) 273.

2. Blackstone "Commentaries" II pp. 447, 448—see Note 49 in Pitt Lewis' edition.

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Good wine, a friend, because I'm dry,
Or lest I shall be by and by,
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Although the *vin du marché*, the drink to bind the bargain, was well recognized in certain of the French customary codes, and although the eastern part of the country was settled by the French, there is not the slightest reason to suspect that our old custom was borrowed from the French. There seems to be no room to doubt that it was an old English custom. I have found but one instance of it in an English court; and it may be of interest to transcribe it here.

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(In some versions, we find instead of "quid memini," "commemini"; and instead of "aut . . . aut," "et . . . et.")

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The learned editor, (Sir) Frederic W. Maitland, adds a note: "According to a common custom the bargain is bound by a drink. In French, if not in English law, this solemnity seems to have had a legal force."

It is to be observed that in mediaeval Latin the diphthong *ae* is seldom used, the single letter *e* being generally used instead—this, in the text, we have Ade for Adae: curie for curiae: Thome for Thomae. The word "beverech" used here for "a drink" is the Latin post-classical "biberagium" (from *bibo*, I drink) which passed through the forms "beveragium," "bevrarium," and was now well on the way to the French "breuvage" and the English "beverage." Littré, *sub voc.*, "breuvage," notes that in the twelfth century, it had the form "brevage," in the thirteenth "buverage" or "bevrage," in the fifteenth, "breuvaige," or "buvrage," in the sixteenth, "bruvage," or "breuvage." The last form is now settled. The "New English Dictionary" gives a large number of intermediate forms in English. Du Cange in his "Glossarium Mediae et Infimae Latinitatis," Paris, 1840, *sub voc.* defines biberagium as "quod praeter pretium corollarii vice in emptionibus conceditur"—the Louisianian "lagniappe"—and cites the Tabularium Majoris Monasterii and the Statutes of Gildas of Berwick (where the word is spelled "berevagium," "bervagium" and "beveragium"). The final syllable in "beverech" cannot be guttural; being soft, it indicates that whatever was the case with classical Latin, the mediaeval "g" was sometimes soft.

This "special damage" we should consider too remote and cite *Hadley v. Baxendale*; but why should it not be actionable? I presume, simply "cause it 'tain't."⁶

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CRIME CURBS.—The frequent announcements in the press that crime commissions have met or are about to meet to discuss ways and means to curb, correct or even eradicate crime result in the subsequent publication of a new list of names of committee members who are to furnish the panacea for the cure of the given criminal condition that prompted the given meeting. And that is all that ever happens, discounting of course the cant and oratory ever present at such gatherings.

Close attention to the results achieved by these well meaning, if futile, bodies has led me to the conclusion that the crusaders' spirit has never dominated the pompous and important gentlemen and mayhap ladies who lend themselves to the popular American pastime of getting into the papers.

To me, a mere citizen and an officer of the court by virtue of my right to practice law, it seems that a few practical if radical suggestions, would not hinder the guardians of righteousness, should they in their desire really to help the situation, take measures to adopt them.

A brief analysis of the crime situation discloses the following facts:

The state's attorney's office is hopelessly involved in politics. This of necessity means that the state's attorney himself cannot and does not devote all the time that the public pays for to his duties. Politics necessitates the appointment of assistants, not on a merit basis but on a political fence-building basis. His assistants are invariably chosen for their service to his party or faction, their geographical location, religious denomination and their willingness to continue to carry their precincts. A lawyer of more than average ability earning ten thousand a year or more seldom if ever is found in the county prosecutor's office. The pay there is small, the political

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7. Justice of the Supreme Court of Ontario, Appellate Division.

DIVERSITIES

WETTING THE BARGAIN.—In my boyhood in Upper Canada, and more especially in the rural districts, a custom prevailed of "wetting the bargain." Of course, some act, more or less formal, "by which conclusive assent is manifested to the terms of a bargain, has been common to all countries and in all ages."¹ This was in the absence of a writing; and until this act was done, the bargain was not considered finally closed. The Jew plucked off his shoe and handed it to his neighbor; the Indian smoked a pipe; the followers of the Roman or civil law gave *arrha* or earnest, as *emptiois venditionis contractae argumentum*.² At the English common law earnest was sometimes given, as will appear from section 17 of the Statute of Frauds—or a God's penny, *argentum Dei*—to bind the bargain.³

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7. Justice of the Supreme Court of Ontario, Appellate Division.

ANOTHER BASSET.—[Written for the Honorable Mr. Justice Bassett of the Supreme Court of Maine].—An action in which another Basset was concerned throws an interesting sidelight on mediaeval ways. The custom of a person vowing himself to religion and taking the religious garb on the approach of death, after a serious illness, &c., is well known. Even at the present day in some religions, men in a large way of business have been known on the approach of old age to withdraw from worldly affairs, to 'make their souls.' I know personally of one such instance in the case of a millionaire in the United States about twenty-five years ago.

In Easter Term, 4 Jo., (1203), we find the entry¹ "Ebor"—Robertus de Buleford' Phillippus de Bilingee Osmundus Crozere Gaufridus de Etton', missi ad videndum utrum infirmitas qua Eudo de Bailloil' essoniavit se versus Reginaldum Basset de placito terre dicunt quod non fuit languidus et quod dederunt ei diem in xv dies post Pascha Et sciendum quod quidem homo Eudonis venit et dicit quod habitum religionis suscepit post visum militum."

York—Robert de Buleforde, Philip de Bilingee, Osmud Crozier, Geoffrey de Etton, sent to see whether the incapacity whereby Eudo Bailloll' essoigned himself against Reginald² Basset in a plea of land [was sickness or not], say that he was not sick and that they give him a day the Quinzaine of Easter. And be it known that a certain man of Eudo's comes and says that he took the religious habit after the view by the knights.

Basset sued Eudo; Eudo did not appear but sent a representative, *essoniator*, to Court to excuse his non-attendance on the ground of sickness, *de malo lecti* (other excuses were *de malo veniendi*, *de malo ville*, &c.) Basset was sceptical: he sued out a writ to the Sheriff to select four Knights (poor men, *pauperes*, would not do) to visit the essoigned man: the Knights found that he was not sick and directed him to be in court a fortnight after Easter—at the Common Law xv dies, 15 days, meant a fortnight, first and last days being inclusive. Eudo sees the game is up and assumes the religious habit which stays all actions against him. Eudo did not appear on the day nor did he essoign himself:

Basset seems to have taken the word of Eudo's man at its face value; but another litigant was more sceptical.

"Ebor"—Alanus de Hatton' optulit se versus Eudonem de Bailloil de placito iij carucatarum cum pertinentiis in Yarperthorp: et ipse essoniaverat se de malo veniendi et de malo lecti: et visus fuit per iij milites qui testati sunt quod non fuit languidus et quod dederunt ei diem in xv dies post Pascha:³ et tunc non venit vel

1. "Curia Regis Rolls in the Reigns of Richard I and John . . . 3-5 John," London, 1925 (i. e., vol. II) p. 194: the subsequent cases are on pp. 226 and 250 respectively.

2. Sometimes translated "Reynold"—"Basset" sometimes is written "Basset"; "Bailloll" is sometimes "Baillol," "Bailoll," etc.

3. i. e., "Pascham."

se essoniavit: set quidam ex suis dicit quod pre⁴ nimia infirmitate post visum militum reddidit se religioni. Et quia nescitur ntrum ita sit vel non, consideratum est quod terra capiatur in manum domini regis et summoneatur quod sit in xv dies post festum Sancte Trinitatis auditurus iudicium suum”

York. Alan de Hatton presented himself again Eudo de Baillol in a plea of three carucates with appurtenances in Yarperthorp (Easthorpe in Appleton le Street, Yorkshire): and he (Eudo) essoigned himself *de malo veiendi* (bad roads, broken bridges, swollen fords, &c.,)⁵ and *de malo lecti* (sickness; pregnancy is generally *de malo ventris*—but Eudo was not setting up that) and he was viewed by four Knights, who testified that he was not sick and that they gave him a day the Quinzaine of Easter: and that time he did not come or essoign himself; but a certain man of his says that by reason of excessive infirmity he rendered himself to religion after the view of the Knights, and inasmuch as it is not known whether this was so or not, it is considered that the land be taken into the hand of our Lord the King and he be summoned to be present to hear judgment in a fortnight after Holy Trinity.

It was true he had abjured the world, “reddidit se religioni,” “habitus religionis suscepit,” and left to his son and heir Eudo the younger, the burden of his land.

The claimants, no doubt were proceeding to enforce their rights, real or alleged, against the new tenant, for we find in Trinity Term, 5 Jo., (1203), the following entry:

“Ebor’—G. filius Petri significavit justiciariis quod non permittant Eudonem de Baill, qui infra etatem esse dicitur, impliacitari de aliquo tenemento suo quod pater ejus tenuit die qua habitum religionis suscepit donec idem heres talis sit etatis quod secundum consuetudinem rengni⁶ debeat placitare”

York. Geoffrey Fitz Peter (Chief Justiciar of England) signified to the Justices that they should not permit Eudo do Bailloll, who is said to be under age, to be impleaded concerning any tenement of his which his father held on the day he assumed the religious habit, until the said heir shall be of such age as that by the custom of the realm he should plead.⁷

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

4. The dipthong “æ” was generally written “e” in these mss.

5. In one Irish case, I find a litigant assoigning himself on account of the road being beset by highwaymen.

6. An ‘n’ was not infrequently inserted before “gn,” e. g., Angnes, congnovit, rengnum, etc.

7. Where the land was taken “in manum regis” it might be sought “per plevinam,” but only at the proper time “ad diem et terminum”—if this were not done, there was danger of the tenant losing it.

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WILLIAM PENN AND WITCHCRAFT

WILLIAM RENWICK RIDDELL, LL. D., D. C. L., etc.*

The State of Pennsylvania deserves well of our world, the so-called 'Anglo-Saxon or English-speaking world, in publishing the *Minutes of the Provincial Council of Pennsylvania, from the Organization to the Termination of the Proprietary Government*, Philadelphia, 1852.

These minutes are of extraordinary interest as showing how people of our race work out the problem of self-government, self-dependence, self-protection: in the present Article, I do not go beyond the first volume, beginning with the "10th of the first month, 1682-3," i. e., March 10, 1683 (the year by Chapter 41 of the acts of the General Assembly of Pennsylvania, passed December 7, 1682, "beginning with . . . ye month called March").

The Council was exceedingly busy—passing legislation on all kinds of subjects, Murder, Coining and Selling Servants into other Provinces, down to Branding of Cattle and Height of Fences. Sometimes it would be threatening a man with impeachment for treason, sometimes reproving and fining another for "being disored in drink": now fixing the price of Tavern Keepers' wares at "seaven pence halfe penny a meal and one penny a qt. for beer," and then directing that "negroes, male or female" found "gadding abroad on the . . . first dayes of the week, without a tickett from their Mr. or Mrs. or not in their Compa," should be carried "to gaole there to remain that night, and that without meat or drink & . . . be publickly whipt next morning with 39 Lashes well laid on, on their bare backs for which their sd Mr. or Mrs. should pay 15d to the whipper att his deliverie of ym to yr Mr., or Mrs."

At this meeting the Council had to devise means to save the Province from "Sennekers and ffrench" who were "invating his Ma'ties Territoryes in America," "a pitieful enemie, if they could be brought to fight fairlie, but the wood, swamps and bushes gives them the opportunity of vexing us"; at that, until Thomas Clifton disproved the charge, denying him the seat on the council to which the County of Sussex had elected him, on "accot of the Deboachery of sd Clifton and in particular yt ye Clifton in his Discourse, should vse this Expression: that he was not ffor Yea and Ney, but for God Damm

*Justice of Appeal, Ontario.

You"—or expressing disapprobation of "Coll. Talbot" who "ridd up to" Joseph Bowles' House, "near Iron hill, about 8 miles distance from New Castle" and called him "Brozen faced, Impudent, Confident Dogg," adding "Dam you, you Dogg."

One of the troubles of the council a little later, was having to listen to "pat Robinson . . . the Secrie" getting off Latin maxims—it is allowable to suspect that it was "pat" who began the disregard of the Act of December 7, 1682, which directed that "ye days of ye week . . . Shall be called as in Scripture & not by Heathen names (as are vulgarly used) as ye first, second & Third daies of ye week . . ."—at all events, after King William took Pennsylvania into his own hands in 1692, instead of 2nd day, 3rd day &c., we find Moonday, Tuesday, &c. (Fryday and Saturnday included), and these in April, 1695, to give way to Die Lunae, Die Martis, Die Mercury (i. e., Mercurii, the letter "y" being frequently used for the double "i"). Die Jovis, Die Veneris—Saturday was called Dies Saturni for a time but in May, 1697, the more usual form was adopted: even then, however, the orthography seems to have troubled the "secrie" for we find Die Sabatti, Die Sabatthi, Die Sabathi, Die Sabatti, as well as Die Sabbati, the regular form.

Coming, now, to the subject of this paper—"Att a Councill held at Philadelphia ye 7th, 12th Mo., 1683" (February 7, 1684), there attended "Wm. Penn, Propor & Govr" (Proprietor and Governor) and four Councillors, Lasse Cock, Wm. Clayton, Jno Symcock and Tho. Holmes.

There was only one item of business, but that was of great importance—the Minutes reads: "Margaret Mattson and Yeshro Hendrickson, Examined and about to be proved Witches; whereupon, this board Ordered that Neels Matson should enter into a recognizance of fifty pounds for his Wiff's appearance before this board the 27th Instant, Hendrick Jacobson doth the same for his Wife.

Adjourned till the 20th 12th Mo., 83" (February 20, 1684).

This investigation into great crimes was in England part of the jurisdiction of the Privy Council and, after its creation by the Statute (1487) 3 Henry 7, cap. 1, of the Court of Star Chamber, the first "Judicial Committee of the Privy Council": but that jurisdiction was ended in England as of July 1, 1641, by the Act (1640) 16 Car. I, cap. 10. I assume the power of Penn in his Council in this regard came from the Royal Charter of Charles II of March 4, 1681, wherein and whereby, *inter alia*, "WE WILL, that the said William Penn and his heires shall assemble in such sort and forme as to him and them shall

seeme best and the same lawes duely to execute unto and upon all people within the said Countrey and limits thereof."¹

At Philadelphia, February 27, met in Council Penn and seven Councillors.

A Grand Jury was "attested, The Govr (Penn) gave them their Charge and the Attorney Genall attended them with the presentmt." There were 21 Grand Jurymen and their names are given.² "*Post Meridiem*. The Grand Jury made their returne and found the Bill."

The Petty Jury were called and those absent were "fined 40s each man" (say \$5). "Margarit Matson's Indictmt was read, and she pleads not Guilty and will be tryed by the Countrey"—as she had better to avoid the fate of Giles Corey at Salem, Mass., in September, 1692.

The prisoner being a Swede, one of the Councillors, "Lasse Cock (was) attested Interpriter between the Propor (Proprietor) and the Prisoner at the Barr."³

"The Petty Jury were Impanneld; their names are" given, twelve in all. Then came the evidence—or rather, the testimony; for of evidence there was none.

Henry Drystreet attested that "he was toold⁴ 20 years agoe that the prisoner at the Barr was a Witch & that severall Cows were bewicht by her." This was improper and absurd enough, but worse was to follow—Drystreet went on: "also that James Saunderling's mother toold him that she bewicht her cow, but afterwards said it was a mistake and that her Cow should⁵ doe well againe for it was not her Cow but an Other Person's that should dye." No wonder

¹By the way, at the succeeding meeting, February 20, the Verdict of a Coroner's Jury was reported "that Benj. Acrod killed himselfe with drinke wch might give the Province a pretence to his Estate therein": but Penn "Relinquished all his Claime thereunto in Councill" and the Estate of the alcoholic *felo de se* was disposed of to pay his debts and then to be distributed according to law, with our friend "pat Robinson," as Administrator.

²What would in more technical times be considered an irregularity occurred—one of the Grand Jurymen was called as a witness for the Crown. Some years ago at Welland, Ontario, before the late Chancellor, Sir John Boyd, I, as Crown Counsel, moved to quash an Indictment because I found one of the Grand Jury a necessary witness for the Crown. The Indictment was quashed, the Grand Jurymen discharged, a new Bill found, the prisoner convicted and an appeal prevented.

³Later and during the trial, "James Claypoole attested Interpritor betwixt the Propor and the Prisoner": Claypoole does not seem to have been a Councillor.

⁴Everyone knows the story of the wit who, when asked why he pronounced Rome, as though spelled Room, countered by saying: "If I may be so boold, I should like to be toold why you call it goold."

⁵An idiom still in use in Scotland—the Greek optative.

"Magaret Mattson saith that she vallues not Drystreet's⁶ Evidence; but if Sanderlin's Mother had come, she would have answered her."

Then came Charles Ashcom who "saith that Anthony's Wife (the prisoner's daughter) being asked why she sould⁴ her Cattle; was because her Mother had Bewitcht them having taken the Witchcraft

⁶See *Colonial Records* as mentioned in Text, Vol. 1, pp. 57, 59, 60, 93-96, 115, 268, 380.

One interesting fact is the fining by the Council of the County Court of Philadelphia £40 for assuming to try the title to land "in ye County of Bucks." Meeting of Council, June 20, 1683, *do.*, *do.*, p. 76.

It may be added that shortly before the death of Penn but after his removal to England, the Legislature of Pennsylvania, May 31, 1718, passed the following legislation:

"And be it further enacted by the authority aforesaid, That another statute made in the first year of the reign of King James the First, chapter twelfth, entitled 'An act against conjuration, witchcraft, and dealing with evil and wicked spirits,' shall be duly put in execution in this province, and of like force and effect, as if the same were (here) repeated and enacted." 3 *Statutes at Large of Pennsylvania from 1682 to 1801*, p. 203.

This was confirmed by the Privy Council, May 26, 1719; *do.*, *do.*, p. 214.

The English Act referred to is (1603) 1 Jac. 1, ch. 12; it is not printed in the ordinary collections, but will be found in Keble's ponderous folio, 1687, at pp. 966, 967. The important parts are as follows:

"That if any person or persons, after the said Feast of Saint Michael the Archangel next coming, shall use, practice or exercise any Invocation or Conjururation of any evil and wicked Spirit; (2) or shall consult, covenant with, entertain, employ, feed, or reward any evil and wicked Spirit, to or for any intent or purpose; (3) or take up any dead man, woman or child, out of his, her, or their grave, or any other place where the dead body resteth, or the skin, bone, or any other part of any dead person, to be employed or used in any manner of Witchcraft, Sorcery, Charm, or Incantment; (4) or shall use, practice, or exercise any Witchcraft, Incantment, Charm, or Sorcery, (5) whereby any person shall be killed, destroyed, wasted, consumed, pined, or lamed in his or her body, or any part thereof; (6) That then every such offender or offenders, their aiders, abettors, and confessors, being of any the said offences duly and lawfully convicted and attainted, shall suffer pains of death as a felon or felons, (7) and shall lose the privilege and benefit of Clergy, and Sanctuary. III. And further, to the intent that all manner of practice, use or exercise of Witchcraft, Incantment, Charm or Sorcery, should be from henceforth utterly avoided, abolished and taken away, (2) Be it enacted by the authority of this present Parliament That if any person or persons shall from and after the said Feast of St. Michael the Archangel next coming, take upon him or them by Witchcraft, Incantment, Charm or Sorcery, to tell or declare in what place any treasure of gold or silver should or might be found or had in the earth or other secret places; (3) or where goods or things lost or stoln, should be found or become; (4) or to the intent to provoke any person to unlawful love, (5) or whereby any cattel or goods of any person shall be destroyed, wasted or impaired, (6) or to hurt or destroy any person in his or her body, (7) although the same be not effeced and done; That then all and every such person and persons so offending, and being thereof lawfully convicted, shall for the said offence suffer imprisonment by the space of one whole year, without bail or mainprize, and once in every quarter of the said year, shall in some Market Town, upon the Market day, or at any such time as any fair shall be kept there, stand openly upon the Pillory by the space of six hours and there shall openly confess his or her error and offence."

That witchcraft continued to be a very real thing for long in Pennsylvania may appear from the following extract from the proceedings at the "Council held at Philadelphia ye 21st of 3 Mo. 1701" (May 21, 1701) printed in the Sec-

of Hendrick's Cattle and put it on their Oxon; She myght keep but noe Other Cattle, and also that one night the Daughter of ye Prisoner called him up hastely and when he came she sayd there was a great Light but Just before and an Old woman with a Knife in her hand at ye Bedd's feet and therefore shee cryed out and desired Jno. Symcock (one of the Councillors) to take away his Calves or Else she would send them to Hell."

All this farrago, the chatter of a hysterical woman, was worthy of the prisoner's contempt: she "Saith where is my Daughter: let her come and say so."

An "Affidaid of Jno Vanculin (was) read, Charles Ashcom being a witness to it"; but what it contained, does not appear.

"Annakey Coolin attested, saith her husband took the Heart of a Calfe that Dyed, as they thought, by Witchcraft, and Boyled it, whereupon the Prisoner at ye Barr came in and asked them what they were doing, they said boyling of flesh; she said they had better they had Boyled the Bones with severall other unseemly Expressions."

Anneke seems to have said something about geese not reported: and the significance of the testimony taken down wholly escapes me. Apparently it had some baleful meaning, for the prisoner not only denied "Annakey Cooling's attestation concerning the Gees . . . saying she was never out of her Conoo," but also said "that she never said any such things Concerning the Calve's heart."

"Jno. Cock attested sayth he knows nothing of the matter"—then comes another affidavit: "Tho: Balding's attestation was read, and Tho: Bracy attested saith it is a True copy." So closed the case for the prosecution. "The Prisoner denyeth all things and saith that ye witnesses speake only by hear say."

ond Volume of *The Minutes of the Provincial Council of Pennsylvania*, Philadelphia, 1852 (usually cited 2 *Col. Rec.*) p. 20.

"Present

"The Proprietary and Governour [William Penn]

Edwd. Shippen
Saml. Carpenter
Griffith Owen

} Esq'rs.

Thos. Story
Humpry Murray
Caleb Pussy [Pusey]

} Esq'rs.

"A Petition of Robt. Guard and his Wife being read, setting forth That a Certain Strange Woman lately arrived in this Town being Seized with a very Sudden illness after she had been in their Company on the 17th Instant, and Several Pins being taken out of her Breasts, One John Richards, Butcher, and his Wife Ann, charged the Petitr. with Witchcraft, & as being the Authors of the Said Mischief: and therefore, Desire their Accusers might be sent for, in Order either to prove their Charge, or that they might be acquitted, they Suffering much in their Reputation, & by that means in their Trade.

Ordered, that the said John & Ann Richards be sent for; who appearing, the matter was inquired into, & being found trifling, was Dismissed."

Of course a modern Judge would direct the Jury to find a Verdict of Not Guilty there being not a scrap of evidence against the accused: but Penn in the existing state of public opinion, probably acted wisely in leaving the matter to the Twelve.

"After wch ye Govr gave the jury their Charge concerning ye Prisoner at ye Barr.

The Jury went forth, and upon their Returne Brought her in Guilty of haveing the Comon fame of a witch, but not guilty in manner and forme as Shee stands Indicted."

This although not strictly regular was a sound common-sense verdict wholly justified by the testimony.

Then "Neels Mattson and Antho. Neelson (apparently the husband of the visionary daughter of the accused) Enters into a Recognizance of fifty pounds apiece, for the good behavior of Margaret Matson for six months."

It will be remembered that another woman had also been accused of witchcraft—"Yeshro Hendrickson" said to be the wife of Hendrick Jacobson"—she turns out to be "Gertrude" wife of "Jacob Hendrickson": she is not prosecuted, but

"Jacob Henrickson enters into the Recognizance of fifty pounds for the good behavior of Getro Hendrickson for six months." Then, after a good day's work, the Council "Adjourned till ye 20th day of ye first Mo., 1684" (March 20, 1684).

Nothing more appears of these alleged witches charged in the "infancy of things": and I am not aware of any successors.⁶

How much did William Penn believe in Witchcraft? And how much of his conduct was Statecraft?

WHY NOT GIVE TITUS OATES A CHANCE?

WILLIAM RENWICK RIDDELL, LL.D., F. R. Hist. Soc., Etc.^a

This is the age of Rehabilitation—Senator Beveridge in his exceedingly interesting and valuable Life of Chief Justice Marshall has cleared from stain the memory of the much-abused Aaron Burr—I have in my humble way attempted to deodorize the reputation of Dodson & Fogg, execrated for nearly a century—the virtuous Captain Kidd receives almost an annual white-washing, the most recent wielder of the brush being Ralph D. Paine in the new edition of his “The Book of Buried Treasure”—Dr. John Kitto made of Judas Iscariot, a sincere disciple and ardent lover of his Master and his Master’s Kingdom—and William Hohenzollern in his recent *Apologia pro Vitâ Suâ* has attempted to show that William II of Germany was not the arrogant and self-willed overlord of popular estimation but a meek and humble constitutional monarch, doing as he was told and almost hungering for things to do which he hated and knew would do him harm. It will probably be thought that he is not so successful as the Senator¹: I venture to hope that my own success is greater than William’s: Captain Kidd’s apologists make out a fairly good case: but William’s success is comparable to Dr. Kitto’s.

Why not give Titus Oates a chance?

The Dictionary of National Biography begins its account of that noted person thus: “Oates, Titus (1649-1705) perjurer.” Is that any kind of way for Thomas Secombe or any other biographer to set out?

^aJustice of the Supreme Court of Ontario.

¹I see that a learned Professor has undertaken the same task—with such success that an irreverent reviewer in the *New York Times* says: “Professor Barnes tells us who killed Cock Robin; he ‘proves’ that Germany didn’t start the War and that Mr. Raymond Poincaré did.” *The Genesis of the World War: an Introduction to the Problem of War Guilt.* By Harry Elmer Barnes. . . . Alfred A. Knopf, New York. One never knows what Professors will be up to—I was one myself, *Consule Planco*—it will be remembered that Professor Key of London gave Cataline a clean sheet and almost made us forget *Quousque tandem*, etc., etc.

Dr. Kitto’s attempt to whitewash Judas would have found little favor with old Coelius Sedulius Scotus, who in Lib. v. carm. 4, of his *Carmina*, has a strong *Invectio in Judam*, and describes him as “. . . cruenta, ferox, audax, insane, rebellis, Perfide, crudelis, fallax, venalis, inique, Traditor immitis, fere proditor, impie latro”—bloody, fierce, reckless, insane, rebellious, Perfidious, cruel, lying, venal, wicked, Pitiless traitor, brutal betrayer, impious thief. (Andrew Anderson’s edition, Edinburgh, 1701, of *Coelii Sedulii Scoti Poemata Sacra* . . .) In his *Hymnus Jambicus* . . . *de Christo*, Sedulius has “Tunc ille Judas carnifex Ausus Magistrum tradere”—Then that butcher Judas Dared to betray the Master.

Fortunately, Oates has left behind a little volume² with the story of his trial, etc., a 16 mo. of 340 pages, "*A / Display / of / Tyranny / or / Remarks / upon / The Illegal and Arbitrary Proceedings, in the Courts of Westminster / and Guild Hall London / From the year 1678, To the Abdication of the late King James, / in the year 1688 / In which time the Rule was / Quod / Principi placuit, Lex esto / First Part / London, Printed, Anno Angliae Salutis / primo, 1689. / Sold by Book-Sellers in London & V Westminster.*" (Neat touch, that *Anno Angliae Salutis primo!*)

This book seems to have been written shortly after Oates' release from prison to which he had been sentenced for life after his conviction for perjury within three months after the Accession in February, 1685, of James II. His release came speedily after the landing of William of Orange who received him as a martyr early in 1689.

The work is dedicated to "the Eminently Deserving and Highly Honoured Sr. Samuel Barnardiston, Baronet" who had been Foreman of the Whig Grand Jury who ignored the Bill for Treason against Shaftesbury in 1681 and became (1672) Member of the House of Commons for Suffolk, "though opposed by the united power of Tories, Pensioners and Papists" and counted out by the Sheriff, Sir William Soame—he was an ultra-Whig and ultra-Protestant. Then follows "Remarks upon the Tryal of Dr. Titus Oates, upon an indictment for Perjury; at the King's Bench Bar at Westminster before Sr. George Jeffryes (Baron of Wem) Lord Chief Justice."

As is well known, Oates the son of a rector of some note as a "dipper" or anabaptist, "slipped into orders" in the Church of England and became a vicar: he got into trouble and escaped indictment for perjury by flight. Becoming chaplain on board a King's ship, he was in a few months expelled from the Navy: he later professed reconciliation to the Church of Rome, went to the Jesuit College at Valladolid whence he was expelled—then he joined the Seminary at St. Omer from which he was also expelled.

²In "*Anno Angliae Salutis Secundo, 1690*" was published "*The Second Part / Of the / Display / of / Tyranny / or / Remarks / upon / The Illegal and Arbitrary Proceedings in the Courts of Westminster / and Guild Hall / London / from the Year 1678, to the Abdication of the late King James / in the Year 1688 / In which time the Rule was / Quod / Principi placuit, Lex esto.*" This is also attributed to Titus Oates. If he is actually the author of either, it is somewhat curious that the name is uniformly spelled "Otes." Perhaps like the coachhorse, so long as he had Otes he did not care for 'ay.

Another account of this Trial will be found in a rare 12mo. in my library: "*An Exact / Abridgment / of all the / Trials / . . . Relating to the Popish, and pre-tended Protestant-Plots . . . London, MDCXC,*" pp. 372, *sqq.* See also 10 Howell's State Trials 1079, 1227, *sqq.*

Coming back to England he became the sponsor for the "Popish Plot" or "Pla-a-at" as he called it—an alleged plot of the Jesuits to kill King Charles and raise the Roman Catholic James, Duke of York, to the throne.

His success was phenomenal, assisted as it was by the mysterious and to this day unexplained death of the magistrate to whom he first applied, Sir Edmund Berry Godfrey. The Privy Council, the House of Commons and the people at large were alike alarmed, a general fast day was set, popish recusants were ordered out of London and a reward offered for the apprehension of Jesuit or Catholic Priests. A number of prosecutions followed, convictions, executions—Coleman, Ireland, Grove, Pickering, Whitbread, Harcourt, Fenwick, Gaven, Turner, Langhorne—(this last a lawyer).

But Oates ventured to accuse the Queen of being privy to a plot to kill her husband—and that was too much for Charles II; good-natured as he was, easy-going as he pretended to be, he respected his Queen if he did not love her. The King turned against him when he called the Duke of York a traitor; and the Duke sued him in *scandalum magnatum*: Jeffreys, who had formerly favored him, charged against him and the jury found damages against him of £100,000—Oates had to go to prison and on James' Accession he was put on his trial for perjury, May 8, 1685, and convicted.

The trial was at bar before a court composed of Jeffreys, C. J. and the Puisnés, Sir Francis Wythens (or Withens), Sir Richard Holloway and Sir Thomas Walcot—the jury were Sir William Dodson, Sir Edmund Wiseman, Richard Aley, Thomas Fowlis, Thomas Blackmore, Peter Pickering, Robert Bedingfield, Thomas Rawlinson, Roger Reeves, Ambrose Isted, Henry Collyer and Richard Howard.

There were two charges: one of perjury in swearing at the trial of Whitebread, Ireland, Fenwick, Pickering and Grove (five Jesuits) that Oates and the three first-named were present at a "treasonable Consult at the White-Horse Tavern in the Strand, the 24th of April, 1678," &c—the other is not of importance here.

In giving his account of the trial it is wholly natural that Oates should first pay his respects to the Bench.

Of the Chief Justice, Jeffreys, he does not say worse than that the House of Commons had, in 1650, asked King Charles II to remove him from all public office for traducing and obstructing Petitioning for the sitting of the Parliament and so betraying the rights of the subject. Wythens, he said, "was advanced to a seat upon that Bench by the . . . vote of the House of Commons. October

29, 1680," that he had betrayed the undoubted rights of the subjects of England by presenting to the King an address expressing an Abhorrence to Petitioning His Majesty for a Parliament—and was expelled from the House of Commons“ for this High Crime.”

Holloway, he says, was advanced to this station for his “part in the dispatching Stephen Colledge,” the “Protestant Joiner,” who came in arms to Oxford in 1681 when the Parliament was there sitting and who after a London Grand Jury had ignored a Bill for Treason against him, was taken to Oxford and there indicted, tried and convicted before a Special Commission of four Judges, North, C. J., Jones, Raymond and Levins, JJ., Holloway being Recorder of Oxford and one of the prosecuting counsel—Colledge was executed. Mr. Justice Walcot “was the best of all the four, but as poor³ as Sr. Robert Wright and by consequence a fit tool to serve the purposes of that Juncture.” Wright, be it remembered, was “a Profligate Lawyer of *Lincoln’s Inn*” and for assisting in 1678 in burning the papers of Colman, the Duke of York’s Secretary, “was afterwards preferred to sit by turns in every of the courts at Westminster and at length to the place of Lord Chief Justice of England than whom

³Poor Mr. Justice Walcot does not seem to have improved his financial position before his death. At all events, the House of Commons was informed, Saturday, January 25, 1689, that he “dyed Intestate and had not left an estate sufficient to pay his Debts.” (p. 227.)

Walcot had sat, June 24, 1684, as Junior Puisné with Jeffreys, C. J., and Withens and Holloway, JJ., in the Court of King’s Bench when Sir Thomas Armstrong was set to the Bar. Armstrong had been indicted for High Treason but had fled beyond the seas and been regularly outlawed for non-appearance. He had been captured and was brought before the Court of King’s Bench for sentence. He claimed a Trial under the Statute of 6 Edward VI which provided that an offender outlawed when beyond the seas might within a year yield himself to the Chief Justice and offer to traverse the indictment and would thereupon be received to traverse and have a trial. He said that he yielded himself to the Chief Justice, and as the year had not expired from his outlawry, claimed the benefit of the statute. The Attorney General, Sir Robert Sawyer, ridiculed the proposition and the Chief Justice held against it. Armstrong thereupon urged that the privilege of a trial had been granted to one Holloway under the same circumstances, a short time before, April 21, 1684. The Chief Justice said that that was “the Grace and Mercy of the King, who may, if he please, extend the same to you.” Armstrong, fighting for life, still contended “that the twelve months not being past he ought to have the Law and he demanded no more. Thereupon the *Bloody Monster* in a most insolent and inhumane manner concluded thus: ‘That you shall have by the grace of God; see that execution be done on *Friday* next according to Law. *You shall have the full benefit of the Law.*’” And executed he was.

After the Revolution, June 20, 1689, Sir Robert Sawyer was expelled from the House of Commons for his share in this outrage. Then the Attainder was reversed, and, in the following January, it was ordered that the widow and children of Sir Thomas Armstrong should be paid £5,000 by the Judges and Prosecutors (including Sawyer) “as a Recompence of the Losses they had sustained by reason of his Attainder.” Jeffreys was dead, as was Walcot—Jeffreys thereby escaping execution in all probability.

a person more scandalous and ignorant was never at any age placed there."

What chance, I ask, had the innocent before that tribunal?

Then there were no less than seven lawyers turned loose on him: the Attorney General, Sir Robert Sawyer, a vicious prosecutor who was, in 1689, expelled from the House of Commons for his conduct in another prosecution;⁴ the Solicitor General, Hon. Heneage Finch, whose characteristics were similar to those of the other Finch, the Chief Justice of the Common Pleas, who induced the Judges to sign the Opinion in the Ship Money Case which got so many of them into trouble in 1641, and who escaped punishment by fleeing the country: Jennings, the Recorder of London; Mr. North, Mr. Jones, Mr. Malloy and Mr. Hanses. This last was "L'Estrang's⁵ Assistant and Brother Burgess in Parliament for Winchester, both of them being chosen by the direction of Mr. Bernard Howard a noted Papist, Brother to Cardinal Howard."

The Prisoner had no Counsel; but it is obvious that a score of the most eminent would not have altered the result.

The charge being that he had committed Perjury by swearing that he had been at a meeting in London on April 24, 1678, the Crown, after proving that he did so swear, gave evidence of its untruth by calling "about twenty *Jesuites and students of St. Omers*, these all testified that the defendant came to St. Omer's in *December*, 1677, and went not from thence until *June*, 1678." Of course, if this was to be believed, the case was pretty well proved. The jury convicted, as they could not very well help doing on the charge made to them. And Dr. Titus Oates, the "Protestant Champion" was sentenced, *inter alia*, to be "Whipt from Aldgate to Newgate" and two days thereafter to be "Whipt from Newgate to Tyburn by the hands of the common Hangman." The House of Commons, June 11, 1689, resolved, *inter alia*, that "the verdicts . . . were corrupt, and that the judgments given thereupon were cruel and illegal."⁶ No blame can be attached to the jury—but what of the court?

"The rage of the Chief Justice and the extraordinary zeal of the King's Counsel" were such as were to be expected from the men and the times; and Oates had no more reason to complain of them than had scores of other defendants in State Trials. The same may be said of the badgering by court and counsel of the defense witnesses and their tender and courteous treatment of those for the

⁴See preceding Note (3).

⁵I. e., the well-known Sir Roger L'Estrange.

⁶P. 38: *Journal House of Commons for Martis, 11^o die Junii, 1689.*

Crown. Nor were the points of law raised by Oates of much value. They were objections to the validity of the evidence brought against him. They were formulated as follows:

(1.) "*That a Papist in a Cause of Religion is not to be received and believed as a good Witness.*" For this was cited "Bulstrode's Reports, part 2, 155,"⁷ and it was said that this "was also my Lord Coke's opinion." But the case does not support the proposition and no such opinion by Coke has ever been found. Not even the K. K. K. of K. goes so far as to say that the evidence of a "Papist" is not to be received. Of course, the weight to be attached to it is for the jury alone.

(2.) The second objection "was their education bred up in a Seminary against Law." This, again, went to credit only—and, moreover, the Seminary at St. Omers was not against the law of its *locus* and it was not and could not be subject to English law.

(3.) The statutes quoted were two in number: (a) 27 Eliz. c. 2, *An Act against Jesuits, Priests and other such like disobedient Persons* made it treason for any Jesuit or Ecclesiastick person of the church of Rome to come to England. But even if these witnesses came within the prohibition, it was only an Attaint of Treason that one was excluded from being a witness—and they were not attainted (b) 3 Car. 1, c. 2 is *nihil ad rem*. It has no bearing on evidentiary capacity.

(4.) Is objection No. 1 stated in different language.

(5.) When motions were made for leave to bring indictments of perjury against witnesses who accused Lord Shaftesbury of treason, these motions were overruled because "they would not have the King's witnesses indicted of perjury. . . ." But all that had been decided was that the Crown could not be compelled to prosecute anyone for a crime, *in invitum*. The bench was wholly justified in holding that all this "was trifling and idle;" the bench did not err in law in such a decision. There were, however, more points in the case than Oates made.

In the first place, he was refused the right of peremptory challenge.⁸ It cannot be said to be absolutely clear that such a right existed at the Common Law⁹ and accordingly I pass it over here.

⁷The case meant is *Attorney General v. Griffiths et al.*, 2 Bulstrode 155, 11 Jac. (B. R.)

⁸This appears from the Report in 10 State Trials. Oates does not even mention it in his volumes.

⁹See the discussion in 10 St. Tr. I hope to write an article on the question in the near future.

It may be of interest to note an account of this trial given by a contemporary, Sir John Bramston, K. B., son of the Chief Justice of the King's

But witnesses were called for the Crown to swear that he had sworn falsely on other occasions—the Earl of Castlemaine and Sir George Wakeman who said that “what he swore against them at their tryals was false.” That this was wholly illegal is quite beyond question, and there is no Court of Appeal which would not set the verdict aside.

To suggest that Oates had a fair trial is absurd. No State prisoner had a fair trial in those days; and Jeffreys would have laughed to scorn the idea that he had any right to a fair trial. But he had the right to a legal trial, and that he did not have. Anyone can imagine the immense damage done to his defense by men of rank swearing that he had perjured himself on two trials similar to that in which the Crown was now charging that he had committed perjury.

Why not give Titus Oates a chance?

Bench, who got into trouble for joining in the Opinion of the Judges as to the legality of Ship Money Writs in 1640, and himself an able lawyer of considerable note. In a book of extraordinary interest: *The Autobiography of Sir John Bramston, K. B.*, . . . published by the Camden Society, London, 1845, we read on p. 194:

“Oates hath binn indicted for periurie, and found guiltie in two indictments. In one the periurie assigned was for swearing he was at a consult with seuerall Jesuites at the White Horse tauerne in the Strand on such a day, whereas he was not then in England, but at St. Omer's. The periurie in the other assigned was, in swearing that Ireland (one of the Jesuites indicted and executed) was in London such a day, whereas Ireland was at that tyme in Staffordshire. He was found guilty vpon both indictments and had judgement to stand in the pillorie in seuerall places, to be whipt one day from Algate to Newgate, another day from Newgate to Tyburne; to stand in the pillorie yearly duringe his life on certain dayes (the dayes on which the periurie was assigned to be committed), fined and imprisoned duringe his life.”

We are told also, p. 318, that he was (with a few others) excluded by name from the General Pardon granted by King James II.

THE HISTORY, THEORY AND RESULTS OF PAROLE

HELEN LELAND WITMER*

I

THE DEVELOPMENT OF PAROLE IN ENGLAND

The origin of an idea is difficult to trace. We are fond in our day of going back to the Greek and Roman philosophers to find the starting point of each theory. Doubtless the same could be done for parole. Plato is sometimes credited with first suggesting the idea in his *De Legibus*. We are not concerned here so much, however, with the origination of the idea as with the history of parole in practice, and the honor of first developing it into a system must go to England. Maconochie is usually credited with being the father of parole, but there seems to be some evidence that the idea was current before he put it into practice on Norfolk Island. However this may be—and the history of it will be shown later—it is certain that it was in the Australian penal colonies that parole had its start. The starting point of a discussion of parole is, therefore, with the transportation system of England.

The word "parole" was not applied to the system until its introduction into the United States. England, then as now, called it by the various names of probation-pass, ticket-of-leave, and license, but the fundamental idea was the same.

The development of parole in England is so intimately bound up with that of transportation that it seems necessary to follow out the development of that system also. By the Magna Charta all Englishmen were protected from compulsory exile, and banishment was unknown to the common law except for those criminals in sanctuary who preferred *perdere patriam quam vitam*, to leave the country rather than their life. Before the time of Elizabeth imprisonment, too, which to our minds is such a common penalty, was not a legal punishment, and the gaols were used to house only untried prisoners, debtors, and felons under the sentence of death. The gallows, the pillory, the stocks, flogging, branding, fining, and the like were the means used at that time to deter crime. The era of Elizabeth, however, brought the necessity for new punishment, for pauperism, vagabondage,

*State University, Minneapolis, Minn.

WILLIAM PENN AND WITCHCRAFT

AND WHY NOT GIVE TITUS OATES A CHANCE?

WILLIAM RENWICK RIDDELL, LL. D., D. C. L., etc.*

The State of Pennsylvania deserves well of our world, the so-called 'Anglo-Saxon or English-speaking world, in publishing the *Minutes of the Provincial Council of Pennsylvania, from the Organization to the Termination of the Proprietary Government*, Philadelphia, 1852.

These minutes are of extraordinary interest as showing how people of our race work out the problem of self-government, self-dependence, self-protection: in the present Article, I do not go beyond the first volume, beginning with the "10th of the first month, 1682-3," i. e., March 10, 1683 (the year by Chapter 41 of the acts of the General Assembly of Pennsylvania, passed December 7, 1682, "begining with . . . ye month called March").

The Council was exceedingly busy—passing legislation on all kinds of subjects, Murder, Coining and Selling Servants into other Provinces, down to Branding of Cattle and Height of Fences. Sometimes it would be threatening a man with impeachment for treason, sometimes reproving and fining another for "being disored in drink": now fixing the price of Tavern Keepers' wares at "seaven pence halfe penny a meal and one penny a qt. for beer," and then directing that "negroes, male or female" found "gadding abroad on the . . . first dayes of the week, without a tickett from their Mr. or Mrs. or not in their Compa," should be carried "to gaole there to remain that night, and that without meat or drink & . . . be publickly whipt next morning with 39 Lashes well laid on, on their bare backs for which their sd Mr. or Mrs. should pay 15d to the whipper att his deliverie of ym to yr Mr., or Mrs."

At this meeting the Council had to devise means to save the Province from "Sennekers and ffrench" who were "invating his Ma'ties Territoryes in America," "a pitieful enemie, if they could be brought to fight fairlie, but the wood, swamps and bushes gives them the opportunity of vexing us"; at that, until Thomas Clifton disproved the charge, denying him the seat on the council to which the County of Sussex had elected him, on "accot of the Deboachery of sd Clifton and in particular yt ye Clifton in his Discourse, should vse this Expression: that he was not ffor Yea and Ney, but for God Damm

*Justice of Appeal, Ontario.

You"—or expressing disapprobation of "Coll. Talbot" who "ridd up to" Joseph Bowles' House, "near Iron hill, about 8 miles distance from New Castle" and called him "Brozen faced, Impudent, Confident Dogg," adding "Dam you, you Dogg."

One of the troubles of the council a little later, was having to listen to "pat Robinson . . . the Secrie" getting off Latin maxims—it is allowable to suspect that it was "pat" who began the disregard of the Act of December 7, 1682, which directed that "ye days of ye week . . . Shall be called as in Scripture & not by Heathen names (as are vulgarly used) as ye first, second & Third daies of ye week . . ."—at all events, after King William took Pennsylvania into his own hands in 1692, instead of 2nd day, 3rd day &c., we find Moonday, Tuesday, &c. (Fryday and Saturday included), and these in April, 1695, to give way to Die Lunae, Die Martis, Die Mercury (i. e., Mercurii, the letter "y" being frequently used for the double "i"). Die Jovis, Die Veneris—Saturday was called Dies Saturni for a time but in May, 1697, the more usual form was adopted: even then, however, the orthography seems to have troubled the "secrie" for we find Die Sabatti, Die Sabatthi, Die Sabathi, Die Sabatti, as well as Die Sabbati, the regular form.

Coming, now, to the subject of this paper—"Att a Council held at Philadelphia ye 7th, 12th Mo., 1683" (February 7, 1684), there attended "Wm. Penn, Propor & Govr" (Proprietor and Governor) and four Councilors, Lasse Cock, Wm. Clayton, Jno Symcock and Tho. Holmes.

There was only one item of business, but that was of great importance—the Minutes reads: "Margaret Mattson and Yeshro Hendrickson, Examined and about to be proved Witches; whereupon, this board Ordered that Neels Matson should enter into a recognizance of fifty pounds for his Wiff's appearance before this board the 27th Instant, Hendrick Jacobson doth the same for his Wife.

Adjourned till the 20th 12th Mo., 83" (February 20, 1684).

This investigation into great crimes was in England part of the jurisdiction of the Privy Council and, after its creation by the Statute (1487) 3 Henry 7, cap. 1, of the Court of Star Chamber, the first "Judicial Committee of the Privy Council": but that jurisdiction was ended in England as of July 1, 1641, by the Act (1640) 16 Car. I, cap. 10. I assume the power of Penn in his Council in this regard came from the Royal Charter of Charles II of March 4, 1681, wherein and whereby, *inter alia*, "WE WILL, that the said William Penn and his heires shall assemble in such sort and forme as to him and them shall

seeme best and the same lawes duely to execute unto and upon all people within the said Countrey and limits thereof."¹

At Philadelphia, February 27, met in Council Penn and seven Councillors.

A Grand Jury was "attested, The Govr (Penn) gave them their Charge and the Attorney Genall attended them with the presentmt." There were 21 Grand Jurymen and their names are given.² "*Post Meridiem*. The Grand Jury made their returne and found the Bill."

The Petty Jury were called and those absent were "fined 40s each man" (say \$5). "Margarit Matson's Indictmt was read, and she pleads not Guilty and will be tryed by the Countrey"—as she had better to avoid the fate of Giles Corey at Salem, Mass., in September, 1692.

The prisoner being a Swede, one of the Councillors, "Lasse Cock (was) attested Interpreter between the Propor (Proprietor) and the Prisoner at the Barr."³

"The Petty Jury were Impanneld; their names are" given, twelve in all. Then came the evidence—or rather, the testimony; for of evidence there was none.

Henry Drystreet attested that "he was tould⁴ 20 years agoe that the prisoner at the Barr was a Witch & that severall Cows were bewicht by her." This was improper and absurd enough, but worse was to follow—Drystreet went on: "also that James Saunderling's mother tould him that she bewicht her cow, but afterwards said it was a mistake and that her Cow should⁵ doe well againe for it was not her Cow but an Other Person's that should dye." No wonder

¹By the way, at the succeeding meeting, February 20, the Verdict of a Coroner's Jury was reported "that Benj. Acrod killed himselfe with drinke wch might give the Province a pretence to his Estate therein"; but Penn "Relinquished all his Claime thereunto in Council" and the Estate of the alcoholic *felo de se* was disposed of to pay his debts and then to be distributed according to law, with our friend "pat Robinson," as Administrator.

²What would in more technical times be considered an irregularity occurred—one of the Grand Jurymen was called as a witness for the Crown. Some years ago at Welland, Ontario, before the late Chancellor, Sir John Boyd, I, as Crown Counsel, moved to quash an Indictment because I found one of the Grand Jury a necessary witness for the Crown. The Indictment was quashed, the Grand Jurymen discharged, a new Bill found, the prisoner convicted and an appeal prevented.

³Later and during the trial, "James Claypoole attested Interpreter betwixt the Propor and the Prisoner": Claypoole does not seem to have been a Councillor.

⁴Everyone knows the story of the wit who, when asked why he pronounced Rome, as though spelled Room, countered by saying: "If I may be so boold, I should like to be toold why you call it goold."

⁵An idiom still in use in Scotland—the Greek optative.

"Magaret Mattson saith that she vallues not Drystreet's⁶ Evidence; but if Sanderlin's Mother had come, she would have answered her."

Then came Charles Ashcom who "saith that Anthony's Wife (the prisoner's daughter) being asked why she sould⁴ her Cattle; was because her Mother had Bewitcht them having taken the Witchcraft

⁶See *Colonial Records* as mentioned in Text, Vol. 1, pp. 57, 59, 60, 93-96, 115, 268, 380.

One interesting fact is the fining by the Council of the County Court of Philadelphia £40 for assuming to try the title to land "in ye County of Bucks." Meeting of Council, June 20, 1683, *do., do.*, p. 76.

It may be added that shortly before the death of Penn but after his removal to England, the Legislature of Pennsylvania, May 31, 1718, passed the following legislation:

"And be it further enacted by the authority aforesaid, That another statute made in the first year of the reign of King James the First, chapter twelfth, entitled 'An act against conjuration, witchcraft, and dealing with evil and wicked spirits,' shall be duly put in execution in this province, and of like force and effect, as if the same were (here) repeated and enacted." *3 Statutes at Large of Pennsylvania from 1682 to 1801*, p. 203.

This was confirmed by the Privy Council, May 26, 1719; *do., do.*, p. 214.

The English Act referred to is (1603) 1 Jac. 1, ch. 12; it is not printed in the ordinary collections, but will be found in Keble's ponderous folio, 1687, at pp. 966, 967. The important parts are as follows:

"That if any person or persons, after the said Feast of Saint Michael the Archangel next coming, shall use, practice or exercise any Invocation or Conjuraton of any evil and wicked Spirit; (2) or shall consult, covenant with, entertain, employ, feed, or reward any evil and wicked Spirit, to or for any intent or purpose; (3) or take up any dead man, woman or child, out of his, her, or their grave, or any other place where the dead body resteth, or the skin, bone, or any other part of any dead person, to be employed or used in any manner of Witchcraft, Sorcery, Charm, or Inchantment; (4) or shall use, practice, or exercise any Witchcraft, Inchantment, Charm, or Sorcery, (5) whereby any person shall be killed, destroyed, wasted, consumed, pined, or lamed in his or her body, or any part thereof; (6) That then every such offender or offenders, their aiders, abettors, and confessors, being of any the said offences duly and lawfully convicted and attainted, shall suffer pains of death as a felon or felons, (7) and shall lose the privilege and benefit of Clergy, and Sanctuary. III. And further, to the intent that all manner of practice, use or exercise of Witchcraft, Inchantment, Charm or Sorcery, should be from henceforth utterly avoided, abolished and taken away, (2) Be it enacted by the authority of this present Parliament That if any person or persons shall from and after the said Feast of St. Michael the Archangel next coming, take upon him or them by Witchcraft, Inchantment, Charm or Sorcery, to tell or declare in what place any treasure of gold or silver should or might be found or had in the earth or other secret places; (3) or where goods or things lost or stoln, should be found or become; (4) or to the intent to provoke any person to unlawful love, (5) or whereby any cattel or goods of any person shall be destroyed, wasted or impaired, (6) or to hurt or destroy any person in his or her body, (7) although the same be not effected and done; That then all and every such person and persons so offending, and being thereof lawfully convicted, shall for the said offence suffer imprisonment by the space of one whole year, without bail or mainprize, and once in every quarter of the said year, shall in some Market Town, upon the Market day, or at any such time as any fair shall be kept there, stand openly upon the Pillory by the space of six hours and there shall openly confess his or her error and offence."

That witchcraft continued to be a very real thing for long in Pennsylvania may appear from the following extract from the proceedings at the "Council held at Philadelphia y^e 21st of 3 Mo. 1701" (May 21, 1701) printed in the Sec-

of Hendrick's Cattle and put it on their Oxon; She myght keep but noe Other Cattle, and also that one night the Daughter of ye Prisoner called him up hastely and when he came she sayd there was a great Light but Just before and an Old woman with a Knife in her hand at ye Bedd's feet and therefore shee cryed out and desired Jno. Symcock (one of the Councillors) to take away his Calves or Else she would send them to Hell."

All this farrago, the chatter of a hysterical woman, was worthy of the prisoner's contempt: she "Saith where is my Daughter: let her come and say so."

An "Affidaid of Jno Vanculin (was) read, Charles Ashcom being a witness to it"; but what it contained, does not appear.

"Annakey Coolin attested, saith her husband took the Heart of a Calfe that Dyed, as they thought, by Witchcraft, and Boyled it, whereupon the Prisoner at ye Barr came in and asked them what they were doing, they said boyling of flesh; she said they had better they had Boyled the Bones with severall other unseemly Expressions."

Anneke seems to have said something about geese not reported: and the significance of the testimony taken down wholly escapes me. Apparently it had some baleful meaning, for the prisoner not only denied "Annakey Cooling's attestation concerning the Gees . . . saying she was never out of her Conoo," but also said "that she never said any such things Concerning the Calve's heart."

"Jno. Cock attested sayth he knows nothing of the matter"—then comes another affidavit: "Tho: Balding's attestation was read, and Tho: Bracy attested saith it is a True copy." So closed the case for the prosecution. "The Prisoner denyeth all things and saith that ye witnesses speake only by hear say."

ond Volume of *The Minutes of the Provincial Council of Pennsylvania*, Philadelphia, 1852 (usually cited 2 *Col. Rec.*) p. 20.

"Present

"The Proprietary and Governour [William Penn]

Edwd. Shippen	} Esq'rs.	Thos. Story	} Esq'rs.
Saml. Carpenter		Humphry Murray	
Griffith Owen		Caleb Pussy [Pusey]	

"A Petition of Robt. Guard and his Wife being read, setting forth That a Certain Strange Woman lately arrived in this Town being Seized with a very Sudden illness after she had been in their Company on the 17th Instant, and Several Pins being taken out of her Breasts, One John Richards, Butcher, and his Wife Ann, charged the Petitr. with Witchcraft, & as being the Authors of the Said Mischief: and therefore, Desire their Accusers might be sent for, in Order either to prove their Charge, or that they might be acquitted, they Suffering much in their Reputation, & by that means in their Trade.

Ordered, that the said John & Ann Richards be sent for; who appearing, the matter was inquired into, & being found trifling, was Dismissed."

Of course a modern Judge would direct the Jury to find a Verdict of Not Guilty there being not a scrap of evidence against the accused: but Penn in the existing state of public opinion, probably acted wisely in leaving the matter to the Twelve.

"After wch ye Govr gave the jury their Charge concerning ye Prisoner at ye Barr.

The Jury went forth, and upon their Returne Brought her in Guilty of haveing the Comon fame of a witch, but not guilty in manner and forme as Shee stands Indicted."

This although not strictly regular was a sound common-sense verdict wholly justified by the testimony.

Then "Neels Mattson and Antho. Neelson (apparently the husband of the visionary daughter of the accused) Enters into a Recognizance of fifty pounds apiece, for the good behavior of Margaret Matson for six months."

It will be remembered that another woman had also been accused of witchcraft—"Yeshro Hendrickson" said to be the wife of Hendrick Jacobson"—she turns out to be "Gertrude" wife of "Jacob Hendrickson": she is not prosecuted, but

"Jacob Henrickson enters into the Recognizance of fifty pounds for the good behavior of Getro Hendrickson for six months." Then, after a good day's work, the Council "Adjourned till ye 20th day of ye first Mo., 1684" (March 20, 1684).

Nothing more appears of these alleged witches charged in the "infancy of things": and I am not aware of any successors.⁶

How much did William Penn believe in Witchcraft? And how much of his conduct was Statecraft?

NOTE

It may be of interest to see the form of an old Indictment for witchcraft. The oldest to my hand is in *The Second Part of Symboleography* by William West of the Inner Temple, printed at London by Thomas Wight, 1601.

In Sections 222, 223 and 224 are forms of Indictment for "Killing a man by Witchcraft upon the Statute of Anno 5 of the Queene" (Elizabeth), and for "bewitching a Horse whereby he wasted and became worse."

It will be sufficient to copy here the first: and I shall add in brackets the letters indicated in the print by contractions.

"Jurator[es] presentant pro Domina Regina, quod S. B. de C. in comitatu H. vidua x die Aug[usti] anno regni dictae dominae nostr[ae] Eliz[abethae] dei gratia, Angliae &c., Tricesimo quarto, ac diuersis alijs diebus post dict[um] x diem, quasdem artes detestandas Anglice voc[atas] *Witchcraft and sorcery*, nequiter & felonice practicauit & exercuit apud C. prae[dictum] in comi[tatu] H. prae[dicto] in; super & cont[ra] que[m] dam I. N. de C. prae[dicta] in dict[o] com[itat]u H., *Laborer*, per quasquidem artes dict[us] I. N. a prae[dicto] x Aug[usti] Anno 34 suprad[icto], usque diem p[rae]dic[tum] mensis Aug[usti] anno 34 suprad[icto], periculosissime ac mortaliter aegrotabat & languebat, Ac eodem 24 die Aug[usti] anno suprad[icto] idem I. N. per artes prae-

d[ictas] in dicto com[itatu] H. obiit. Et sic Iuratores praedict[i] presentant quod eadem Sara ipsum I. N. apud C. praedict[am] modo & forma suprad[ictis] ex malitia sua precogitata, voluntarie, diabolice, nequiter & felonice p[er] artes praed[ictas] occidit ac interfecit, contra pacem dictae domin[ae] Regin[ae] nostrae ac contra formam statuti in parlamento dictae dominae Reg[inae] nostrae (tento apud Westm[onasterium] in com[itatu] Midd[lesexo] anno regni suae praed[icti] quint[o]) in huius modi casu prouisi ac rediti"—

"The Jurors present for Our Lady the Queen that Sara B. of C. in the County of H., widow, on the 10th day of August in the thirty-fourth year of the reign of our said Lady Elizabeth by the grace of God, of England, &c., [i. e., August 10], and upon divers days after the said 10th day certain detestable arts in English called Witchcraft and Sorcery wickedly and feloniously practiced and exercised at C. aforesaid in the County of H. aforesaid, in upon and against a certain I. N. of C. aforesaid in the said County of H. *Laborer* by which said certain arts, the said I. N. from the said 10th day of August in the said 34th year until the day aforesaid of the month of August in the 34th year aforesaid most dangerously and mortally was sick and languished. And on the same 24th day of August in the year aforesaid, the same I. N. by the arts aforesaid and in the said County of H. died. And therefore the Jurors aforesaid present that the said Sara I. N. at C. aforesaid in manner and form aforesaid of her malice aforethought, wilfully, diabolically, wickedly and feloniously by the art aforesaid killed and slew against the peace of our said Lady the Queen and against the form of the statute in Parliament of our said Lady the Queen (held at Westminster in the County of Middlesex in the fifth year of her reign) in such case made and provided."

The Statute is (1526) 5 Eliz., ch. 16, not printed in the Statutes at Large as it was repeated by 1 Jac. 1, Ch. 12, and 9 Geo. 2, ch. 5. The unfortunate I. N. died August 24, 1592. There is a defect—a fatal defect in their Indictment. Will some lawyer, preferably from Missouri, point it out? W. R. R.

WHY NOT GIVE TITUS OATES A CHANCE?

WILLIAM RENWICK RIDDELL, LL.D., F. R. Hist. Soc., Etc.^a

This is the age of Rehabilitation—Senator Beveridge in his exceedingly interesting and valuable Life of Chief Justice Marshall has cleared from stain the memory of the much-abused Aaron Burr—I have in my humble way attempted to deodorize the reputation of Dodson & Fogg, execrated for nearly a century—the virtuous Captain Kidd receives almost an annual white-washing, the most recent wielder of the brush being Ralph D. Paine in the new edition of his “The Book of Buried Treasure”—Dr. John Kitto made of Judas Iscariot, a sincere disciple and ardent lover of his Master and his Master’s Kingdom—and William Hohenzollern in his recent *Apologia pro Vitâ Suâ* has attempted to show that Willam II of Germany was not the arrogant and self-willed overlord of popular estimation but a meek and humble constitutional monarch, doing as he was told and almost hungering for things to do which he hated and knew would do him harm. It will probably be thought that he is not so successful as the Senator¹: I venture to hope that my own success is greater than William’s: Captain Kidd’s apologists make out a fairly good case: but William’s success is comparable to Dr. Kitto’s.

Why not give Titus Oates a chance?

The Dictionary of National Biography begins its account of that noted person thus: “Oates, Titus (1649-1705) perjurer.” Is that any kind of way for Thomas Secombe or any other biographer to set out?

^aJustice of the Supreme Court of Ontario.

¹I see that a learned Professor has undertaken the same task—with such success that an irreverent reviewer in the *New York Times* says: “Professor Barnes tells us who killed Cock Robin; he ‘proves’ that Germany didn’t start the War and that Mr. Raymond Poincaré did.” *The Genesis of the World War: an Introduction to the Problem of War Guilt.* By Harry Elmer Barnes. . . . Alfred A. Knopf, New York. One never knows what Professors will be up to—I was one myself, *Consule Planco*—it will be remembered that Professor Key of London gave Cataline a clean sheet and almost made us forget *Quousque tandem*, etc., etc.

Dr. Kitto’s attempt to whitewash Judas would have found little favor with old Coelius Sedulius Scotus, who in Lib. v, carm. 4, of his *Carmina*, has a strong *Invectio in Judam*, and describes him as “. . . cruenta, ferox, audax, insane, rebellis, Perfide, crudelis, fallax, venalis, inique, Traditor immitis, fere proditor, impie latro”—bloody, fierce, reckless, insane, rebellious, Perfidious, cruel, lying, venal, wicked, Pitiless traitor, brutal betrayer, impious thief. (Andrew Anderson’s edition, Edinburgh, 1701, of *Coelii Sedulii Scoti Poemata Sacra* . . .) In his *Hymnus Jambicus* . . . *de Christo*, Sedulius has “Tunc ille Judas carnifex Ausus Magistrum tradere”—Then that butcher Judas Dared to betray the Master.

Fortunately, Oates has left behind a little volume² with the story of his trial, etc., a 16 mo. of 340 pages, "*A / Display / of / Tyranny / or / Remarks / upon / The Illegal and Arbitrary Proceedings, in the Courts of Westminster / and Guild Hall London/ From the year 1678, To the Abdi / cation of the late King James, / in the year 1688 / In which time the Rule was / Quod. / Principi placuit, Lex esto / First Part / London, Printed, Anno Angliae Salutis / primo, 1689. / Sold by Book-Sellers in London & V Westminster.*" (Neat touch, that *Anno Angliae Salutis primo!*)

This book seems to have been written shortly after Oates' release from prison to which he had been sentenced for life after his conviction for perjury within three months after the Accession in February, 1685, of James II. His release came speedily after the landing of William of Orange who received him as a martyr early in 1689.

The work is dedicated to "the Eminently Deserving and Highly Honoured Sr. Samuel Barnardiston, Baronet" who had been Foreman of the Whig Grand Jury who ignored the Bill for Treason against Shaftesbury in 1681 and became (1672) Member of the House of Commons for Suffolk, "though opposed by the united power of Tories, Pensioners and Papists" and counted out by the Sheriff, Sir William Soame—he was an ultra-Whig and ultra-Protestant. Then follows "Remarks upon the Tryal of Dr. Titus Oates, upon an indictment for Perjury; at the King's Bench Bar at Westminster before Sr. George Jeffryes (Baron of Wem) Lord Chief Justice."

As is well known, Oates the son of a rector of some note as a "dipper" or anabaptist, "slipped into orders" in the Church of England and became a vicar: he got into trouble and escaped indictment for perjury by flight. Becoming chaplain on board a King's ship, he was in a few months expelled from the Navy: he later professed reconciliation to the Church of Rome, went to the Jesuit College at Valladolid whence he was expelled—then he joined the Seminary at St. Omer from which he was also expelled.

²In "*Anno Angliae Salutis Secundo, 1690*" was published "*The Second Part/ Of the/Display/of/Tyranny/or/Remarks/upon/The Illegal and Arbitrary Proceedings in the Courts of Westminster/and Guild Hall/London/from the Year 1678, to the Abdi/cation of the late King James/in the Year 1688/In which time the Rule was/Quod/Principi placuit, Lex esto.*" This is also attributed to Titus Oates. If he is actually the author of either, it is somewhat curious that the name is uniformly spelled "Otes." Perhaps like the coachhorse, so long as he had Otes he did not care for 'ay.

Another account of this Trial will be found in a rare 12mo. in my library: "*An Exact/Abridgment/of all the/Trials/ . . . Relating to the Popish, and pre-/tended Protestant-Plots . . .* London, MDCXC," pp. 372, sqq. See also 10 Howell's State Trials 1079, 1227, sqq.

Coming back to England he became the sponsor for the "Popish Plot" or "Pla-a-at" as he called it—an alleged plot of the Jesuits to kill King Charles and raise the Roman Catholic James, Duke of York, to the throne.

His success was phenomenal, assisted as it was by the mysterious and to this day unexplained death of the magistrate to whom he first applied, Sir Edmund Berry Godfrey. The Privy Council, the House of Commons and the people at large were alike alarmed, a general fast day was set, popish recusants were ordered out of London and a reward offered for the apprehension of Jesuit or Catholic Priests. A number of prosecutions followed, convictions, executions—Coleman, Ireland, Grove, Pickering, Whitbread, Harcourt, Fenwick, Gaven, Turner, Langhorne—(this last a lawyer).

But Oates ventured to accuse the Queen of being privy to a plot to kill her husband—and that was too much for Charles II; good-natured as he was, easy-going as he pretended to be, he respected his Queen if he did not love her. The King turned against him when he called the Duke of York a traitor; and the Duke sued him in *scandalum magnatum*: Jeffreys, who had formerly favored him, charged against him and the jury found damages against him of £100,000—Oates had to go to prison and on James' Accession he was put on his trial for perjury, May 8, 1685, and convicted.

The trial was at bar before a court composed of Jeffreys, C. J. and the Puisnés, Sir Francis Wythens (or Withens), Sir Richard Holloway and Sir Thomas Walcot—the jury were Sir William Dodson, Sir Edmund Wiseman, Richard Aley, Thomas Fowlis, Thomas Blackmore, Peter Pickering, Robert Bedingfield, Thomas Rawlinson, Roger Reeves, Ambrose Isted, Henry Collyer and Richard Howard.

There were two charges: one of perjury in swearing at the trial of Whitbread, Ireland, Fenwick, Pickering and Grove (five Jesuits) that Oates and the three first-named were present at a "treasonable Consult at the White-Horse Tavern in the Strand, the 24th of April, 1678," &c—the other is not of importance here.

In giving his account of the trial it is wholly natural that Oates should first pay his respects to the Bench.

Of the Chief Justice, Jeffreys, he does not say worse than that the House of Commons had, in 1650, asked King Charles II to remove him from all public office for traducing and obstructing Petitioning for the sitting of the Parliament and so betraying the rights of the subject. Wythens, he said, "was advanced to a seat upon that Bench by the . . . vote of the House of Commons. October

29, 1680," that he had betrayed the undoubted rights of the subjects of England by presenting to the King an address expressing an Abhorrence to Petitioning His Majesty for a Parliament—and was expelled from the House of Commons" for this High Crime."

Holloway, he says, was advanced to this station for his "part in the dispatching Stephen Colledge," the "Protestant Joiner," who came in arms to Oxford in 1681 when the Parliament was there sitting and who after a London Grand Jury had ignored a Bill for Treason against him, was taken to Oxford and there indicted, tried and convicted before a Special Commission of four Judges, North, C. J., Jones, Raymond and Levins, JJ., Holloway being Recorder of Oxford and one of the prosecuting counsel—Colledge was executed. Mr. Justice Walcot "was the best of all the four, but as poor³ as Sr. Robert Wright and by consequence a fit tool to serve the purposes of that Juncture." Wright, be it remembered, was "a Profligate Lawyer of *Lincoln's Inn*" and for assisting in 1678 in burning the papers of Colman, the Duke of York's Secretary, "was afterwards preferred to sit by turns in every of the courts at Westminster and at length to the place of Lord Chief Justice of England than whom

³Poor Mr. Justice Walcot does not seem to have improved his financial position before his death. At all events, the House of Commons was informed, Saturday, January 25, 1689, that he "dyed Intestate and had not left an estate sufficient to pay his Debts." (p. 227.)

Walcot had sat, June 24, 1684, as Junior Puisné with Jeffreys, C. J., and Withens and Holloway, JJ., in the Court of King's Bench when Sir Thomas Armstrong was set to the Bar. Armstrong had been indicted for High Treason but had fled beyond the seas and been regularly outlawed for non-appearance. He had been captured and was brought before the Court of King's Bench for sentence. He claimed a Trial under the Statute of 6 Edward VI which provided that an offender outlawed when beyond the seas might within a year yield himself to the Chief Justice and offer to traverse the indictment and would thereupon be received to traverse and have a trial. He said that he yielded himself to the Chief Justice, and as the year had not expired from his outlawry, claimed the benefit of the statute. The Attorney General, Sir Robert Sawyer, ridiculed the proposition and the Chief Justice held against it. Armstrong thereupon urged that the privilege of a trial had been granted to one Holloway under the same circumstances, a short time before, April 21, 1684. The Chief Justice said that that was "the Grace and Mercy of the King, who may, if he please, extend the same to you." Armstrong, fighting for life, still contended "that the twelve months not being past he ought to have the Law and he demanded no more. Thereupon the *Bloody Monster* in a most insolent and inhumane manner concluded thus: 'That you shall have by the grace of God; see that execution be done on Friday next according to Law. *You shall have the full benefit of the Law.*'" And executed he was.

After the Revolution, June 20, 1689, Sir Robert Sawyer was expelled from the House of Commons for his share in this outrage. Then the Attainder was reversed, and, in the following January, it was ordered that the widow and children of Sir Thomas Armstrong should be paid £5,000 by the Judges and Prosecutors (including Sawyer) "as a Recompence of the Losses they had sustained by reason of his Attainder." Jeffreys was dead, as was Walcot—Jeffreys thereby escaping execution in all probability.

a person more scandalous and ignorant was never at any age placed there."

What chance, I ask, had the innocent before that tribunal?

Then there were no less than seven lawyers turned loose on him: the Attorney General, Sir Robert Sawyer, a vicious prosecutor who was, in 1689, expelled from the House of Commons for his conduct in another prosecution;⁴ the Solicitor General, Hon. Heneage Finch, whose characteristics were similar to those of the other Finch, the Chief Justice of the Common Pleas, who induced the Judges to sign the Opinion in the Ship Money Case which got so many of them into trouble in 1641, and who escaped punishment by fleeing the country: Jennings, the Recorder of London; Mr. North, Mr. Jones, Mr. Malloy and Mr. Hanses. This last was "L'Estrang's⁵ Assistant and Brother Burgess in Parliament for Winchester, both of them being chosen by the direction of Mr. Bernard Howard a noted Papist, Brother to Cardinal Howard."

The Prisoner had no Counsel; but it is obvious that a score of the most eminent would not have altered the result.

The charge being that he had committed Perjury by swearing that he had been at a meeting in London on April 24, 1678, the Crown, after proving that he did so swear, gave evidence of its untruth by calling "about twenty *Jesuites and students of St. Omers*, these all testified that the defendant came to St. Omer's in *December*, 1677, and went not from thence until *June*, 1678." Of course, if this was to be believed, the case was pretty well proved. The jury convicted, as they could not very well help doing on the charge made to them. And Dr. Titus Oates, the "Protestant Champion" was sentenced, *inter alia*, to be "Whipt from Aldgate to Newgate" and two days thereafter to be "Whipt from Newgate to Tyburn by the hands of the common Hangman." The House of Commons, June 11, 1689, resolved, *inter alia*, that "the verdicts . . . were corrupt, and that the judgments given thereupon were cruel and illegal."⁶ No blame can be attached to the jury—but what of the court?

"The rage of the Chief Justice and the extraordinary zeal of the King's Counsel" were such as were to be expected from the men and the times; and Oates had no more reason to complain of them than had scores of other defendants in State Trials. The same may be said of the badgering by court and counsel of the defense witnesses and their tender and courteous treatment of those for the

⁴See preceding Note (3).

⁵I. e., the well-known Sir Roger L'Estrange.

⁶P. 38: *Journal House of Commons for Martis, 11^o die Junii*, 1689.

Crown. Nor were the points of law raised by Oates of much value. They were objections to the validity of the evidence brought against him. They were formulated as follows:

(1.) "*That a Papist in a Cause of Religion is not to be received and believed as a good Witness.*" For this was cited "Bulstrode's Reports, part 2, 155,"⁷ and it was said that this "was also my Lord Coke's opinion." But the case does not support the proposition and no such opinion by Coke has ever been found. Not even the K. K. K. of K. goes so far as to say that the evidence of a "Papist" is not to be received. Of course, the weight to be attached to it is for the jury alone.

(2.) The second objection "was their education bred up in a Seminary against Law." This, again, went to credit only—and, moreover, the Seminary at St. Omers was not against the law of its *locus* and it was not and could not be subject to English law.

(3.) The statutes quoted were two in number: (a) 27 Eliz. c. 2, *An Act against Jesuits, Priests and other such like disobedient Persons* made it treason for any Jesuit or Ecclesiastick person of the church of Rome to come to England. But even if these witnesses came within the prohibition, it was only an Attaint of Treason that one was excluded from being a witness—and they were not attainted (b) 3 Car. 1, c. 2 is *nihil ad rem*. It has no bearing on evidentiary capacity.

(4.) Is objection No. 1 stated in different language.

(5.) When motions were made for leave to bring indictments of perjury against witnesses who accused Lord Shaftesbury of treason, these motions were overruled because "they would not have the King's witnesses indicted of perjury. . . ." But all that had been decided was that the Crown could not be compelled to prosecute anyone for a crime, *in invitum*. The bench was wholly justified in holding that all this "was trifling and idle;" the bench did not err in law in such a decision. There were, however, more points in the case than Oates made.

In the first place, he was refused the right of peremptory challenge.⁸ It cannot be said to be absolutely clear that such a right existed at the Common Law⁹ and accordingly I pass it over here.

⁷The case meant is *Attorney General v. Griffiths et al.*, 2 Bulstrode 155, 11 Jac. (B. R.)

⁸This appears from the Report in 10 State Trials. Oates does not even mention it in his volumes.

⁹See the discussion in 10 St. Tr. I hope to write an article on the question in the near future.

It may be of interest to note an account of this trial given by a contemporary, Sir John Bramston, K. B., son of the Chief Justice of the King's

But witnesses were called for the Crown to swear that he had sworn falsely on other occasions—the Earl of Castlemaine and Sir George Wakeman who said that “what he swore against them at their tryals was false.” That this was wholly illegal is quite beyond question, and there is no Court of Appeal which would not set the verdict aside.

To suggest that Oates had a fair trial is absurd. No State prisoner had a fair trial in those days; and Jeffreys would have laughed to scorn the idea that he had any right to a fair trial. But he had the right to a legal trial, and that he did not have. Anyone can imagine the immense damage done to his defense by men of rank swearing that he had perjured himself on two trials similar to that in which the Crown was now charging that he had committed perjury.

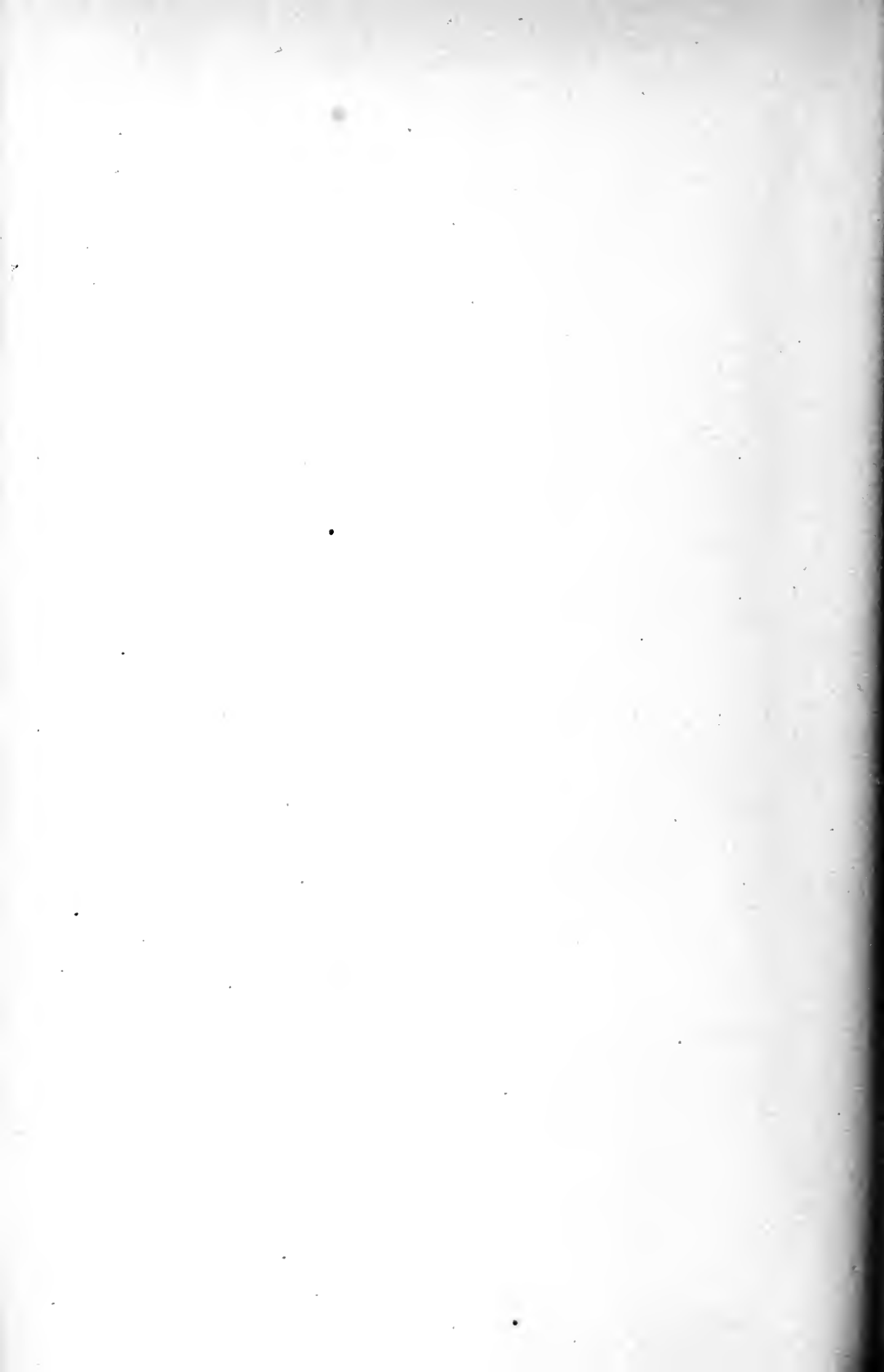
Why not give Titus Oates a chance?

Bench, who got into trouble for joining in the Opinion of the Judges as to the legality of Ship Money Writs in 1640, and himself an able lawyer of considerable note. In a book of extraordinary interest: *The Autobiography of Sir John Bramston, K. B.*, . . . published by the Camden Society, London, 1845, we read on p. 194:

“Oates hath binn indicted for periurie, and found guiltie in two indictments. In one the periurie assigned was for swearing he was at a consult with seuerall Jesuites at the White Horse tauerne in the Strand on such a day, whereas he was not then in England, but at St. Omer's. The periurie in the other assigned was, in swearing that Ireland (one of the Jesuites indicted and executed) was in London such a day, whereas Ireland was at that tyme in Staffordshire. He was found guilty vpon both indictments and had judgement to stand in the pillorie in seuerall places, to be whipt one day from Algate to Newgate, another day from Newgate to Tyburne; to stand in the pillorie yearly duringe his life on certain dayes (the dayes on which the periurie was assigned to be committed), fined and imprisoned duringe his life.”

We are told also, p. 318, that he was (with a few others) excluded by name from the General Pardon granted by King James II.





The School

(Registered)

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Scenes" and "The Sleep Walking Scene" from *Macbeth*; "Conspirators Scene" from *Julius Caesar*, and the whole of *As You Like It*, on April 13, 1914. For this play Mrs. Mayberry, Art Teacher, painted special scenery, representing the Forest of Arden, which has been used in nearly every play since.

In 1915 the only effort was "The Trial Scene" put on as part of an Empire Day concert in the City Hall, on May 20th. In 1916 the full effects of the war began to be felt and nothing was done in the dramatic line. In 1917, however, in honour of the fiftieth anniversary of the Dominion's formation, a special play, entitled "Canada's Golden Wedding," was written by Mrs. Kate Mickle, Chesley, and, through Mr. J. D. Campbell's efforts, most thoroughly prepared and presented.

In 1918 and 1919 the drama still pined, but a light play, "My Lord in Livery," was presented as part of an Empire Day concert on May 30th in the Normal School. The proceeds, \$124, were devoted to the Memorial Window Fund, which eventually reached the total of \$1,360, thus meeting the cost of the beautiful Memorial Window (\$1,000) and of a pamphlet containing pictures and details of service of the fourteen men who lost their lives in the war.

In 1920 the greater part of *Midsummer Night's Dream* was presented at the Normal School and proved a very attractive play. For some reason 1921 passed away without any Shakespearean effort, but following this playless year there came a great revival of interest, so that now it may be safely asserted a settled policy of annual Shakespearean plays has been adopted. The dates are fixed for the two nights of the week nearest the twenty-fourth of May, usually Thursday and Friday. Patrons come from all the towns and villages around Stratford and over eight hundred people see the plays on these two nights.

In 1922 the *Comedy of Errors* was presented by two distinct casts on two successive nights, a plan followed for the next three years. In 1923 *As You Like It* was again chosen and proved as successful as in 1914. In 1924 the courage of the students led them to attempt *Romeo and Juliet* with the usual success. In 1925 *Much Ado About Nothing* was attempted and, though not at all a well-known play locally, achieved well-merited approval.

Having tried repeating the same play for two nights with different casts, the students of 1925-26 decided to introduce two different plays. The First Class students, with unusual assurance, selected *Macbeth* and the Second Class students chose *Two Gentlemen of Verona*. Both drew the usual large and appreciative audiences, and in all probability this plan will be followed for the next few years.

The most popular plays of the nine already presented have been *Merchant of Venice*, *As You Like It* and *Two Gentlemen of Verona*, while *Romeo and Juliet* was almost equally popular. Most interesting fact

of all is the popularity with young people. More and more the audiences are made up of high school students and others of that age. Graduates of the Normal School make a point of reaching Stratford on one of these Shakespearean nights. Once the date is known the audience is assured.

While, primarily, the object of the production of these plays has been purely educational, and door receipts a quite secondary matter, there has always been a profit of more than one hundred dollars, annually, notwithstanding an outlay of fifty to seventy-five dollars on costumes from the best Toronto costumers. This balance goes to the Students' Sick Benefit Fund and to the Muskoka Sanatorium. The city council has shown its interest in the plays by giving the City Hall free. The price of admission for the public has been fifty cents. Normal students pay twenty-five cents for a ticket good for both nights.

The preparation of the casts has been done by members of the Normal staff. The various parts are assigned before Easter by a committee of staff and students. Practice, two or three times a week, begins after the Easter examinations, and most of it is done in the afternoons between 3.30 and 6 p.m. It does, however, involve a great deal of hard work by trainers and members of the cast, but all agree that it is worth while.

A Normal School should make a distinct contribution to the community in which it is located. The past thirteen years and, more particularly, the past four years, have settled this school's contribution as definitely associated with the immortal Bard of Avon.

"According to Cocker"

WILLIAM RENWICK RIDDELL

EDWARD COCKER, for anything to be according to whom was a certificate of accuracy, was an Englishman of Norfolk or Northampton, born in 1631. He became a teacher of writing and arithmetic in London and later resided in Northampton. A man of considerable learning, he published many works: the *Dictionary of National Biography* enumerates thirty three. But concerning that by which alone his name is kept green, *Cocker's Arithmetick*, there has been, perhaps still is, considerable doubt.¹

However, he is credited with it: *Satis est*. I have before me as I write, a little old book:

Cocker's Arithmetick, being a plain and familiar Method suitable to the meanest Capacity for the full understanding of that Incomparable

Art . . . By John Hawkins . . . The Fortieth Edition² . . . Licensed Sept. 3, 1677. Roger L'strange³, London: Printed for H. Tracy⁴ at the Three Bibles on London Bridge, 1723. A 12mo. 11+191 pages: a well-executed portrait of Cocker by Sutton Nicholls⁵ is prefixed with the lines:—

*Ingenious COCKER (Now to Rest thou'rt gone)
No Art can show thee fully but thine own:
Thy rare Arithmetick alone can show
Th' vast sums of thanks we for thy Labour owe.*

This is "Cöcker"⁶

This edition is dedicated by Hawkins "to his much honoured Friends, Manwaring Davies of the Inner Temple Esq. and Mr. Humphry Davies of St. Mary Newington Butts in the County of Surry"⁷ An address to the Reader by Hawkins and Mr. Edward Cocker's Proeme or Preface follow, the latter bearing hardly on "the pretended Numerists of this Vapouring Age who are more disingeniously Witty to propound unnecessary Questions, than ingenuously Judicious to resolve such as are necessary" and closing ;

"Zoilus and Momus⁸ lie you down and die
For these Inventions your whole force defie."

John Collens⁹ in an Address to the Courteous Reader, dated November 27, 1677, recommends the work, as do fourteen others—for it is "generally approved by all Ingenious Artists". Whoever was the author, the book is well written and by a man of learning.

It is somewhat surprising, indeed, to find in a work intended for those of the meanest capacity, a reference to sines, secants and tangents, quotations from *Oughton's* (i.e., Oughtred's) *Clavis Mathematica* (e) *Gem. Fris. Arith.*: *Alsted Math.*: *Wingate's Arith.*: *More's Arith.*¹⁰ So, too, the Latin *facit* is employed for "makes".

As always in the pre-Johnsonian times the orthography is free and unhampered by rule, e.g., we find, *Vertue*, *numbred*, *an unit*, *tun* (i.e. ton), *wooll*, *barly-corn*, (but *barley*), *margent* (sometimes *margin*), *contrarywise* (sometimes *contrariwise*), *rundlett*, *extream*, *expences*, *hcmogenial*, *carect* (i.e., carat), *mixt*, *coyn*, *cocheneel*, *damnify'd*, *plummer*, *agreeth*, *averdupois*. So, too, there are some things not known in our times. "Troy weight serveth only to weigh Bread, Gold, Silver and Electuaries": "There are 1056 Geometrical Paces in an English Mile": a Dollar is 4s.4d. or 52d.; a Fodder contains 19½ hundredweight; every one knew what a groat was without definition.

The book proceeds on much the same lines as (say) the *Irish National Arithmetic*. Notation, Weights and Measures, Addition (without the word "Addend" for which "Addible Number" is used), Subtraction (without "Minuend" or "Subtrahend" for which "Major" and "Minor" are used), Multiplication, Division, Reduction Ascending and Descend-

ing, Proportion, Rule of Three, Direct and Inverse (without : or ::), Progression, Fellowship, Single and Double, Alligation Medial and Alternate, Vulgar Fractions, with their Addition, Subtraction, Multiplication, Division, Reduction, and Rule of Three, Practice, Barter, Equation of Payments, Exchange, and the inevitable Position,¹¹ Single and Double—ending with *Laus Deo Soli*.

There are too many misprints to be excusable in a mathematical work. Take this for example, p. 109:

Quest. 32. A. flying every Day 40 Miles is pursued the fourth day after by B. posting 50 Miles a Day: now the question is, In how many Days and after how many Miles Travel will A. be overtaken?

Answer, B. overtakes him in 32 Days when they have travelled 600 Miles.

This should be 12 days. A similar misprint makes 9 times 9 = 91. I shall set out in full another Question under Loss and Gain—p. 178.

Quest. 6. A Plummer sold 10 Fodder¹² of Lead (the Fodder is $10\frac{1}{2}$ C.) for 204*l.* 15*s.* and gained after the Rate of 12*l.* 10*s.* *per* 100*l.* I demand how much it cost him *per* C. Answer 18*s.* 8*d.*

Nowadays we should have no trouble about this—£12. 10*s.* is $\frac{1}{8}$ of £100: the selling price is $\frac{8}{9}$ of the buying price and therefore the buying price is $\frac{9}{8}$ of the selling price: $\frac{9}{8}$ of £204. 15*s.* is £182: each fodder cost $\frac{1}{10}$ of £182 = £18. 4*s.*: if 1 fodder is $10\frac{1}{2}$ C, 1 C. cost $\frac{2}{10\frac{1}{2}}$ of £18. 4*s.* or £1. 14*s.* 8*d.*

The fact is, however, that $10\frac{1}{2}$ C. is a misprint for $19\frac{1}{2}$ C; and 1C. cost $\frac{1}{19\frac{1}{2}}$ = $\frac{2}{39}$ of £18. 4*s.* = 18*s.* 8*d.*

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But in those days, brandy was a cardiac, alexipharmic, corroborant, diaphoretic, &c., &c., &c.

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Gemma Frisius (in reality, Gemma Rainer or Regnier, the Frisian) 1508-1555, M.D., wrote on Astronomy and Medicine. The work here referred to is *Arithmeticae Practicae Methodus Facilis*, Wittenberg, 1542, or some later edition.

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*A Fodder or Fother of lead ranged from 19½ to 22½ hundred weight—now generally 19½ *cwt*. Sometimes the *cwt*. was 120 lbs. instead of 112 lbs.

Agriculture for January

A. B. C. THROOP, B.S.A.
Renfrew Collegiate and Vocational School

WEEDS

IN a recent issue of one of the leading farm papers of Canada, the Federal minister and the Provincial ministers of agriculture discussed some of the leading problems confronting the Canadian farmer, to-day. One of the Provincial ministers, in part, said, "There is one problem which seems to be fundamental to general farming, and that is the weed problem. For several years past the menace of weeds has become more serious, until now it is one of the challenging problems to be faced, and one which is fundamental to production. The time has arrived when all parties concerned should unite to take action along the most effective lines; this means a good deal of educational work on the methods of combating the weed nuisance."

The schools of Canada that teach agriculture must continue to be a vital force in this educational work. This means that the study of weeds must be taught from a utilitarian viewpoint. To be able to identify the weeds and weed seeds found in a district is not sufficient: the most efficient methods of control and eradication must also be known.

It is true that this is a big problem for the teacher of agriculture, but if properly done, it is one that will bear fruit in every province of Canada. From the teacher's standpoint there is one factor that offers no difficulty, and that is material with which to work.

What is a weed? There are scores of answers. The following seems to define a weed fairly well: it is a plant which interferes with the growth of a crop to which a field has been temporarily devoted.

The subject might be introduced by asking, why are weeds detrimental to agriculture?

1. They rob the soil of plant food and moisture, thus increasing the effects of drought, by taking the water from the soil and wasting it in evaporation.

2. They crowd out more useful plants, being hardier, and as a rule more prolific.

3. They increase the cost of every farm operation and cause depreciation in the market value of crops because of the presence of weed seeds in grains and grass seeds.

4. Their eradication is costly in labour, time and machinery.

"According to Cocker"

WILLIAM RENWICK RIDDELL

EDWARD COCKER, for anything to be according to whom was a certificate of accuracy, was an Englishman of Norfolk or Northampton, born in 1631. He became a teacher of writing and arithmetic in London and later resided in Northampton. A man of considerable learning, he published many works: the *Dictionary of National Biography* enumerates thirty three. But concerning that by which alone his name is kept green, *Cocker's Arithmetick*, there has been, perhaps still is, considerable doubt.¹

However, he is credited with it: *Satis est*. I have before me as I write, a little old book:

Cocker's Arithmetic, being a plain and familiar Method suitable to the meanest Capacity for the full understanding of that Incomparable Art . . . By John Hawkins . . . The Fortieth Edition² . . . Licensed Sept. 3, 1677. Roger L'strange³, London: Printed for H. Tracy⁴ at the Three Bibles on London Bridge, 1723. A 12mo. 11+191 pages: a well-executed portrait of Cocker by Sutton Nicholls⁵ is prefixed with the lines:—

*Ingenious COCKER (Now to Rest thou'rt gone)
No Art can show thee fully but thine own:
Thy rare Arithmetick alone can show
Th' vast sums of thanks we for thy Labour owe.*

This is "Cocker"⁶

This edition is dedicated by Hawkins "to his much honoured Friends, Manwaring Davies of the Inner Temple Esq. and Mr. Humphry Davies of St. Mary Newington Butts in the County of Surry"⁷ An address to the Reader by Hawkins and Mr. Edward Cocker's Proeme or Preface follow, the latter bearing hardly on "the pretended Numerists of this Vapouring Age who are more disingeniously Witty to propound unnecessary Questions, than ingenuously Judicious to resolve such as are necessary" and closing ;

*"Zoilus and Momus⁸ lie you down and die
For these Inventions your whole force defie."*

John Collens⁹ in an Address to the Courteous Reader, dated November 27, 1677, recommends the work, as do fourteen others—for it is "generally approved by all Ingenious Artists". Whoever was the author, the book is well written and by a man of learning.

It is somewhat surprising, indeed, to find in a work intended for those of the meanest capacity, a reference to sines, secants and tangents, quotations from *Oughton's* (i.e., Oughtred's) *Clavis Mathematica* (e) *Gem. Fris. Arith.*: *Alsted Math.*: *Wingate's Arith.*: *More's Arith.*¹⁰ So, too, the Latin *facit* is employed for "makes".

As always in the pre-Johnsonian times the orthography is free and unhampered by rule, e.g., we find, *Vertue*, *numbred*, *an unit*, *tun* (i.e. ton), *wooll*, *barly-corn*, (but *barley*), *margent* (sometimes *margin*), *contrarywise* (sometimes *contrariwise*), *rundlett*, *extream*, *expences*, *homogenial*, *carect* (i.e., carat), *mixt*, *coyn*, *cocheneel*, *damnify'd*, *plummer*, *agreeth*, *averdupois*. So, too, there are some things not known in our times. "Troy weight serveth only to weigh Bread, Gold, Silver and Electuaries": "There are 1056 Geometrical Paces in an English Mile": a Dollar is 4s.4d. or 52d.; a Fodder contains 19½ hundredweight; every one knew what a groat was without definition.

The book proceeds on much the same lines as (say) the *Irish National Arithmetic*. Notation, Weights and Measures, Addition (without the word "Addend" for which "Addible Number" is used), Subtraction (without "Minuend" or "Subtrahend" for which "Major" and "Minor" are used), Multiplication, Division, Reduction Ascending and Descending, Proportion, Rule of Three, Direct and Inverse (without : or ::), Progression, Fellowship, Single and Double, Alligation Medial and Alternate, Vulgar Fractions, with their Addition, Subtraction, Multiplication, Division, Reduction, and Rule of Three, Practice, Barter, Equation of Payments, Exchange, and the inevitable Position,¹¹ Single and Double—ending with *Laus Deo Soli*.

There are too many misprints to be excusable in a mathematical work. Take this for example, p. 109:

Quest. 32. A. flying every Day 40 Miles is pursued the fourth day after by B. posting 50 Miles a Day: now the question is, In how many Days and after how many Miles Travel will A. be overtaken?

Answer, B. overtakes him in 32 Days when they have travelled 600 Miles.

This should be 12 days. A similar misprint makes 9 times 9 = 91. I shall set out in full another Question under Loss and Gain—p. 178.

Quest. 6. A Plummer sold 10 Fodder¹² of Lead (the Fodder is 10½C.) for 204l. 15s. and gained after the Rate of 12l. 10s. per 100l. I demand how much it cost him per C. Answer 18s. 8d.

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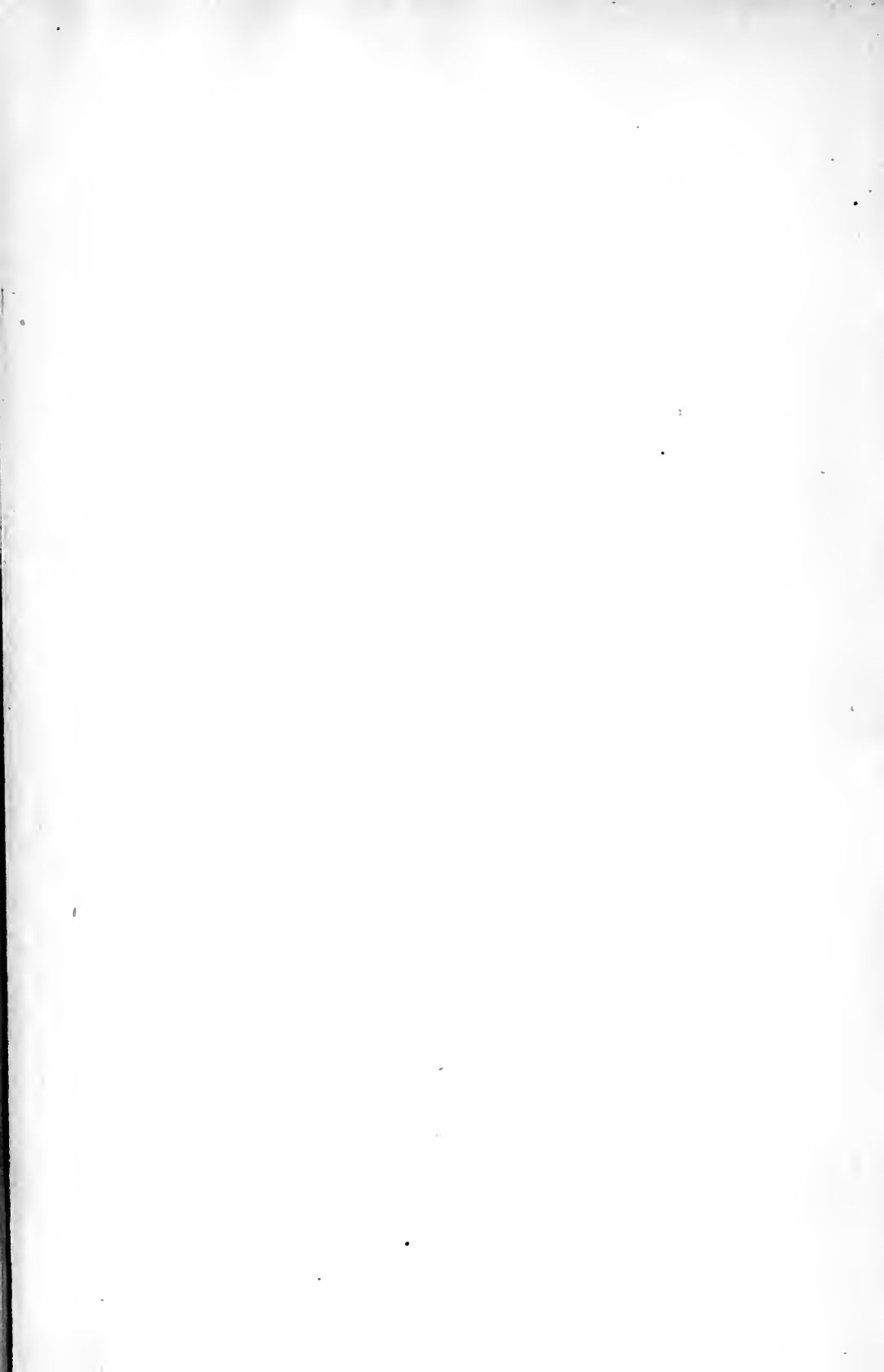
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